TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 226.

JOHN F. NEW, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

(19,301.)

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1 TERRITORY OF OKLAHOMA, } ss:
County of Logan, }

In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210.

Notice and Citation on Appeal.

The President of the United States to the Territory of Oklahoma or to J. C. Roberts, its attorney general and attorney of record in the above styled and numbered cause:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia within 30 days from the date of this writ and notice and on the first day of the October term of said court pursuant to an order allowing an appeal entered in the clerk's office of the supreme court of the Territory of Oklahoma on the 28th day of August A. D. 1903 wherein the said John T. New is the appellant and the said Territory of Oklahoma is the appel-ee to show cause if any there be why the judgment of the supreme court of the said Territory of Oklahoma and the judgment of the said district court of Washita county, Oklahoma Territory therein named, should not be reversed and set aside, and the said cause remanded to said district court of Washita county, Oklahoma Territory for a new trial.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America this August 28th, A. D. 1903 and the Independence of the United States of America the 127th.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

2 TERRITORY OF OKLAHOMA, }
County of Logan. }

In the Supreme Court of the Territory of Okla.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210. Acceptance of Service, Service of Notice and Citation on Appeal.

I, J. C. Roberts the duly appointed and qualified attorney general of the Territory of Oklahoma and attorney of record for the said

defendant in error, The Territory of Oklahoma in the above styled and numbered cause wherein the said John T. New is plaintiff in error do hereby on behalf of said defendant in error, The Territory of Oklahoma accept the service of the within and foregoing notice and citation on appeal of said cause as full legal and complete, and hereby enter appearance for said Territory of Oklahoma, defendant in error.

Witness my hand this 28th August, A. D. 1903.

J. C. ROBBERTS,
Attorney General for the Territory of Oklahoma and Attorney of Record for Territory of Oklahoma in the Above Styled and Numbered Cause.

Filed Aug. 28, 1903.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

3 [Endorsed:] No. 1210. John T. New, plaintiff in error *versus* Territory of Oklahoma, defendant in error. Notice and citation on appeal and acceptance of service of same. Filed Aug. 28, 1903. Benj. F. Hegler, clerk supreme court.

4 TERRITORY OF OKLAHOMA, *County of Logan,* } *ss:*

In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210.

Petition for Appeal.

To the honorable supreme court of Oklahoma Territory, Hon. John H. Burford, chief justice of the supreme court of Oklahoma Territory:

John T. New the petitioner, alleges that he is a citizen of the United States of America and of the Territory of Oklahoma. That heretofore to-wit, on the — day of May A. D. 1901, he was indicted by the grand jury in the territorial district court of Washita county, Oklahoma Territory, charged with the crime of murder of one H. F. Doyle, that thereafter upon the trial of said cause at the October term A. D. 1901 of said court in the said Washita county, there was rendered against him by said district court a judgment of conviction of murder as charged in the indictment, and penal sentence of imprisonment in the territorial penitentiary for life based upon a jury verdict rendered by the jury at said trial.

That thereafter the defendant duly and legally appealed from said judgment of said district court of Washita county to the supreme court of said Oklahoma Territory; which said appeal was heard and said cause adjudged by said supreme court of Oklahoma Territory on the second day of September A. D. nineteen hundred and two, by which said judgment of the supreme court of Oklahoma Territory rendered and entered on the day and date last aforesaid the said judgment and sentence of said district court of said Washita county, Oklahoma Territory, was affirmed.

5 And whereas the petitioner, the said defendant John T. New, feels aggrieved at said judgment of the supreme court of Oklahoma Territory, and desires and now prays to appeal therefrom to the Supreme Court of the United States of America. Your petitioner avers that the supreme court of Oklahoma Territory committed prejudicial error against him in not reversing the said judgment of the district court of Washita county, Oklahoma Territory, and in not remanding the defendant's said cause to said district court of Washita county, Oklahoma Territory, for a new trial because of the grave, fundamental and prejudicial errors committed by said district court of Washita county at defendant's aforesaid trial and conviction in said cause; which errors in said trial court upon defendant's said trial your petitioner the said defendant assigns as follows:

In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error.

Assignment of Errors.

First assignment of error.

The trial court erred in refusing to give in charge to the jury special instruction number five requested by the defendant, which refusal was at the time excepted to and which special requested instruction was as follows:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt, as to whether or not he died from the effects of gun shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument then it is your duty to acquit the defendant.", which said requested instruction correctly stated the rule of law applicable to the evidence in the case and was demanded by said evidence.

6 Second assignment of error.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to in-

struct the jury that the defendant might under the indictment be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

Third assignment of error.

The trial court erred in the 19th section of the instructions to the jury in charging the jury as follows:

"The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that the defendant New could have withdrawn from the scene of the tragedy with safety and could have gone away from the scene of action with safety to his life and person and without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of said homicide then your verdict should be guilty of murder." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and which said charge was erroneous in this:

First. It placed upon the defendant the duty when threatened and approached in a threatening manner upon his own premises to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and
7 circumstances in evidence" before the jury.

Fourth assignment of error.

The trial court erred in instructing the jury in section number 15½ of the instructions as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm, in the mind of an ordinary courageous man the law will not justify the killing on the ground of self-defense," to which instruction to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this: First it does not state correctly the rule of law, and second it does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

Fifth assignment of error.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased, the court in his instructions to the jury using the following language "at the same time the fatal shot in this cause was fired by the defendant," and also in said instructions using the following language "before the fatal shot was fired," thereby invading the province of the jury whose duty it was and not that of the trial judge to determine the issue as to how the deceased came to his death and as to whether deceased came to his death in the manner charged in the indictment.

8 Sixth assignment of error.

The trial court committed error in refusing to give the jury as the law of the case the first special instruction requested by the defendant: "first special instruction requested by the defendant — as follows:

TERRITORY
vs.
NEW. } No. 1.

At the request of the defendant the court instructs the jury as follows:

The jury are instructed as a matter of law that if a person believes and has a reasonable cause to believe that another has sought him out for the purpose of killing him or doing him great bodily harm, and that he is prepared therefor with a deadly weapon, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat but he has a right to stand and defend himself, and pursue his adversary (if necessary) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears, upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

Modified by interlineation (" if necessary ") and given.

Interlineation excepted to by defendant. C. F. I. judge.

" complained of in parenthesis.

And the trial court further erred in modifying said first special requested instruction by interlining the words in parenthesis "if necessary" in said special instruction and giving the same to the jury, thereby wholly changing the meaning of said requested instruction, and depriving defendant of the legal right to act upon reasonable appearances of danger as viewed from his standpoint, to all of which action and rulings of the court the defendant duly excepted at the time.

9 Wherefore the defendant John T. New your said petitioner prays that he be granted and allowed an appeal to the said Supreme Court of the United States of America and that the clerk of the supreme court of Oklahoma Territory be directed to transmit to said Supreme court of the United States a certified copy of the record and case made on appeal, and now on file in this court, under the style of number — John T. New, plaintiff in error, *versus* The Territory of Oklahoma, defendant in error, together with the assignment of error above set forth, and this day filed in said cause, and for such other and further orders and proceedings as shall duly and legally perfect the appeal of your petitioner the said defendant John T. New from the decision of the supreme court of Oklahoma Territory to the Supreme Court of the United States of America.

This August 25th, 1903.

And your petitioner further prays that upon said appeal in the Supreme Court of the United States of America that the Supreme Court of the United States of America do vacate, reverse and set aside said judgment of the supreme court of Oklahoma Territory and said judgment of said territorial district court of said Washita county, Oklahoma Territory, and remand said cause for a new trial to said territorial district of Washita county, Oklahoma Territory

JOHN T. NEW,
Plaintiff in Error.
C. L. HERBERT,
T. G. CHAMBERS,
CULP & GIDDINGS,
Attorneys for Plaintiff in Error.

Endorsed: No. 1210—John T. New, plaintiff in error, *vs.* The Territory of Oklahoma, defendant in error—Petition of John T. New, defendant and plaintiff in error, for appeal.—Filed Aug. 28, 1903, Benj. F. Hegler, clerk supreme court.

10 In the Supreme Court of Oklahoma Territory.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error, } No. 1210.

Assignment of Errors.

First assignment of error.

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Second assignment of error.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might under the indictment be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

11 Third assignment of error.

The trial court erred in the 19th section of the instructions to the jury in charging the jury as follows:

"The jury are instructed that if from all the evidence, facts, and circumstances, in evidence in the case, you believe beyond a reasonable doubt that the defendant New, could have withdrawn from the scene of the tragedy with safety, and could have gone away from the scene of action with safety to his life and person, and without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and nece sary defense of the life or person or habitation of said New at the time of said homicide then your verdict should be guilty of murder." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and which said charge was erroneous in this:

First. It placed upon the defendant the duty, when threatened and approached in a threatening manner upon his own premises, to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and circumstances in evidence" before the jury.

Fourth assignment of error.

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"The court instructs the jury that if a man kills another through

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12 ground of self defense" to which instructions to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this: First, it does not state correctly the rule of law, and second, it does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

Fifth assignment of error.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased, the court in his instructions to the jury using the following language, "at the same time the fatal shot in this cause was fired by the defendant," and also in said instruction using the following language "before the fatal shot was fired," thereby invading the province of the jury whose duty it was and not that of the trial judge to determine the issue as to how the deceased came to his death, and as to whether deceased came to his death in the manner charged in the indictment.

Sixth assignment of error.

The trial court committed error in refusing to give the jury as the law of the case the first special instruction requested by the defendant, first special instruction requested by the defendant being as follows:

TERRITORY
vs.
NEW. } No. 1.

At the request of the defendant, the court instructs the jury as follows:

The jury are instructed as a matter of law that if a person believes and has a reasonable cause to believe that another has sought him out for the purpose of killing him or doing him great bodily harm, and that he is prepared therefor with a deadly weapon, and
13 the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary (if necessary) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

Modified by interlineation (" if necessary ") and given.
Interlineation excepted to by defendant.—C. F. I. judge.
" complained of in parentheses.

And the trial court further erred in modifying said first special requested instruction by interlining the words in parentheses " if necessary " in said special instruction, and giving the same to the jury, thereby wholly changing the meaning of said requested instruction, and depriving defendant of the legal right to act upon reasonable appearances of danger as viewed from his standpoint, to all of which action and rulings of the court the defendant duly excepted at the time.

JOHN T. NEW,
Plaintiff in Error.
C. L. HERBERT,
CULP & GIDDINGS,
T. G. CHAMBERS,
Attorneys for Plaintiff in Error.

Endorsed: No. 1210—John T. New, plaintiff in error, *vs.* The Territory of Oklahoma—Assignments of errors—Filed Aug. 28, 1903—Benj. F. Hegler, clerk supreme court.

14 TERRITORY OF OKLAHOMA, }
County of Logan. }

In the Supreme Court of the Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,	No. 1210. Order Allowing Appeal from the Supreme Court of Oklahoma Territory to the Supreme Court of the United States of America.
vs.	
THE TERRITORY OF OKLAHOMA, Defendant Error.	

Upon the motion and application of T. G. Chambers, counsel for plaintiff in error, John T. New, and upon the filing of the petition of said John T. New for an appeal, together with the filing and presentation of the assignment of errors, and it appearing from said petition and from the record and case made now on file in the supreme court of Oklahoma Territory that the said plaintiff in error and petitioner John T. New is under sentence for the remainder of his natural life at hard labor in the territorial prison of Oklahoma Territory under a judgment and sentence of the district court of Washita county, Oklahoma Territory, upon a conviction under an indictment for murder the penalty and sentence of which might have been death, which said judgment and sentence of said territorial district court of said Washita county, Oklahoma Territory, was an appeal on the second day of September A. D. 1902, affirmed by the supreme court of Oklahoma Territory, and it further appear-

ing that the petition of said John T. New for an appeal is filed in due and legal time and is in all things regular and proper, it is therefore hereby ordered, considered and decreed by the supreme court of Oklahoma Territory that the prayer of said petitioner, John T. New, be granted and that an appeal be and the same is hereby allowed said petitioner John T. New, from the final judgment of this court in his said cause rendered on September second, A. D. 1902, to the Supreme Court of the United States of America, and that the clerk of this court be and he is hereby directed to make and transmit to the Supreme Court of the United States at
15 Washington, District of Columbia, a certified transcript ofall records and proceedings in this court in the said cause fi ed, entered or rendered including the original record and case madl on the appeal, the petition for appeal, assignment of errors, this order for allowing an appeal, and all other proceedings by this court had in said cause. This August 28th A. D., 1903.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed: No. 1210—John T. New, plaintiff in error, *vs.* The Territory of Oklahoma, defendant in error—Order of the supreme court of Oklahoma, allowing appeal to the Supreme Court of the United States of America.—Filed Aug. 28, 1903, Benj. F. Hegler, clerk supreme court.

16 In the Supreme Court, Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

Petition in Error.

The said plaintiff in error complains of the said defendant in error for that the said defendant in error at the regular October term A. D. 1901 of the district court for Washita county, Territory aforesaid, recovered a judgment against said plaintiff in error by the consideration of said court, in a certain action then pending in said court wherein the defendant in error was plaintiff and plaintiff in error was defendant, a copy of the record of the judgment and proceedings in which case, duly certified and authenticated is hereto attached, marked "A" and made a part hereof; and plaintiff in error avers that there is error in said judgment, record and proceedings in this, to-wit:

First. That the said court erred in instructions given to the jury.

Second. That the said court erred in refusing to give instructions asked by the plaintiff in error.

Third. That the said court erred in modifying changing, and altering instructions asked by the plaintiff in error, and in giving them in their changed, altered and modified form.

Fourth. That the said court erred in admitting illegal and incompetent testimony over the objection of defendant below.

Fifth. That the said court erred in rejecting legal and competent evidence offered by defendant below.

17 Sixth. The said court erred in overruling the motion of the plaintiff in error for a new trial.

Seventh. That the said court erred in rendering judgment against plaintiff in error when it should have been given for plaintiff in error according to the law of the land.

Wherefore plaintiff in error prays this honorable court that said judgment be set aside, reversed and that he be restored to all things he has lost by reason thereof, and for costs.

HENRY M. FURMAN AND
FORREST AND LOWE,
Attorneys for Plaintiff in Error.

Filed Mar. 18, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By FLORENCE N. WEIRICK, *Deputy.*

18 In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Case-made. No. 317.

EXHIBIT A TO PETITION IN ERROR.

Filed Mar. 18, 1902. Benj. F. Hegler, Clerk Supreme Court, by Florence N. Weirick, Deputy.

In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Case-made.

Be it remembered, that heretofore, on the respective dates as hereinafter set out, proceedings were had in the above entitled cause, as follows, to-wit:

TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, }

In said District and Territory.

In the matter of drawing the grand and petit jurors within and for the county of Washita, district and Territory aforesaid, for the regular May term, 1901, thereof.

Order.

To the clerk of said district and Territory:

You are hereby commanded to proceed at once to have drawn and summoned 50 persons possessing the qualifications of jurors,
19 according to law, to serve as such in the district court of Washita county, district and Territory aforesaid, for the regular May term, 1901, and place the venire therefor in the hands of the sheriff of said county for service; said venire to command said persons therein contained to be and appear before the district court at Cordell, in the county of Washita, in said district and Territory, on the 6th day of May, 1901, at 9 o'clock a. m. of said day without fail.

It is further ordered, that the first 20 persons so drawn shall be inserted in a venire to be served as grand jurors, and the remaining names so drawn shall be inserted in a venire and served as petit jurors.

Witness my hand at El Reno, Okla., this 19th day of April, 1901.

C. F. IRWIN, *Judge.*

Attest:
E. M. HEGLER, *Clerk.*

And afterwards, to-wit, on the 22nd day of April, 1901, pursuant to the above and foregoing order, comes John W. Miller, the duly elected, qualified and acting sheriff of said county, and G. D. Coker, the duly elected, qualified, and acting clerk of said county, having in his possession and custody the jury box of said county, and together with G. E. Wagner, the duly appointed, qualified, and acting deputy district clerk of said county, in the district clerk's office, proceed in due form, agreeable to said order, to draw the grand and petit jurors for the regular May term, 1901, of the district court of said county; and now the said box having been thoroughly shaken and placed so that the contents are invisible by the said officers, and each of said officers proceed to draw alternately therefrom a ballot until the number required by said order is complete, in the following order, to-wit:—J. D. Stewart, J. B. Pryor, W. H. Cleveland, W. Crawford, J. G. Huckaby, W. H. Reed, John Cresswell, H. W. Cuffell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines,

T. J. Freeman, J. L. Joiner, T. H. Lear, E. D. Rickey, Enoch
20 Jarrell, L. L. Reeve, P. W. Franzen, M. D. Chappelear, Albert Ryan, C. E. Rogers, George Nisle, Philip Schones, J. P. Whittaker, George Loomis, D. Cone, Charley Smith, John Odle, W. F. Chester, J. M. Wheeler, John Bose, Fred R. Kern, O. E. Davis, Clay Thompson, P. H. Buller, D. F. Hollis, W. J. Russell, T. E. Taylor, C. H. Murdock, D. D. Schapansky, Charles Bargley, W. D. Williams, W. F. Schultz, J. H. Maddox, J. H. Farris, Frank Algrim, G. W. Curry, F. R. Burns, and E. Fields.

Whereupon the clerk of said district inserts the first 20 names so drawn in a venire to be served as grand jurors, and the remaining names so drawn, in a venire to be served as petit jurors, and the said ballots are in the presence of said officers destroyed by burning.

And afterwards on the 30th day of April, 1901, comes said sheriff and makes return of the petit jury venire in words and figures *and* as follows, to-wit:

"Received this writ on the 22nd day of April, 1901, and served the same on the within named Albert Ryan, George Nisle, Philip Schones, J. P. Whittaker, W. F. Chester, J. M. Wheeler, George Loomis, John Bose, Fred R. Kern, J. D. Cone, O. E. Davis, Charley Smith, *L*ohn *P*dle, Clay Thompson, P. H. Buller, W. J. Russell, T. E. Taylor, C. H. Murdock, D. D. Schapansky, W. D. Williams, W. F. Schultz, J. H. Maddox, J. H. Farris, Frank Ahlgrim, G. W. Currey, F. R. Burns, and E. Fields, by delivering to them a certified copy of the same. C. E. Rogers, D. F. Hollis, and Charles Bargsley not found in the county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 4th day of May, 1901.

E. M. HEGLER,
District Clerk,
[SEAL.] By G. E. WAGNER, *Deputy.*

21 And afterwards, to-wit, on the 4th day of May, 1901, *and* makes return of the grand jury venire in words and figures as follows, to-wit:

"Received this writ on the 22nd day of April, 1901, and served the same on the within named J. D. Stewart, J. B. Prior, W. H. Cleveland, W. Crawford, J. G. Huckaby, W. W. Reed, John Cresswell, H. W. Cuffell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines, T. J. Freeman, T. L. Lear, E. D. Rickey, Enoch Jarrell, L. L. Reeve, P. W. Franzen, M. D. Chappelear, by delivering a certified copy of the same to them. J. L. Joiner could not be found in the county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 4th day of May, 1901.

[SEAL.] E. M. HEGLER,
District Clerk.
G. E. WAGNER, *Deputy.*

And afterwards on the 4th day of May, 1901, comes the sheriff and county clerk of Washita county, Okla., said clerk having in his possession the jury box of said county and together with the district clerk of said county proceed to draw four names to complete the grand and petit jury panels as heretofore ordered. And now said jury box is thoroughly shaken and placed in such a position as to conceal the contents and thereupon each officer draws alternately a name therefrom till said number is complete in the following order, to-wit: H. G. Westbrook, E. E. Simms, Dan Anderson, and W. G. Armstrong. Whereupon the first name so drawn is inserted in a grand jury venire and the remaining names in a petit jury venire and said venires are placed in the hands of said sheriff for service and the ballots containing said names are destroyed by burning.

And afterwards, to-wit, on the 6th day of May, 1901, comes the said sheriff and makes return of the second grand jury venire in the following language, to-wit:

"Received this writ on the 4th day of May, 1901, and served the same on the within named H. G. Westbrook by delivering to him a certified copy of the same.

JOHN W. MILLER, *Sheriff.*

22 Subscribed and sworn to before me this 6th day of May, 1901.

E. M. HEGLER,
District Clerk.
[SEAL.] G. E. WAGNER, *Deputy.*

And afterwards on the 6th day of May, 1901, comes said sheriff and makes return of the second petit jury venire as follows:

"Received this writ on the 4th day of May, 1901, and served the same on the within named W. L. Armstrong, Dan Anderson and E. E. Simms, by delivering to them a certified copy thereof.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 6th day of May, 1901.

E. M. HEGLER,
District Clerk.
[SEAL.] G. E. WAGNER, *Deputy.*

TERRITORY OF OKLAHOMA,
Second Judicial District, County of Washita.

Be it remembered, that on the sixth day of May, 1901, the same being the first judicial day of the regular May term, 1901, of the district court in and for said county, district, and Territory, the following proceedings among others were had, to-wit:

Court convened in regular session for the May term, 1901, pursuant to an order of the supreme court heretofore made and entered, for the county of Washita, in said district and Territory.

Present and presiding, Hon. C. F. Irwin, judge; E. M. Hegler, clerk; John W. Miller, sheriff; T. R. Jackson, crier and T. F. Millikan, reporter.

By order of the court public proclamation opening court for the actual transaction of business was made, and the following proceedings were had, to-wit:

23 *Empanelling Grand Jury.*

In the matter of empanelling the grand jury within and for the county of Washita, second district, Oklahoma Territory, for the regular May term, 1901.

And now comes the following persons heretofore drawn and summoned to serve as grand jurors into open court and answer present to roll call, to-wit: J. D. Stewart, J. B. Pryor, W. H. Cleveland, W. Crawford, J. G. Huckaby, W. H. Reed, John Cresswell, H. W. Cuffell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines, H. G. Westbrook, T. H. Lear, E. D. Rickey, L. L. Reeve, P. W. Franzen, M. D. Chappelear, Enock Jarrell, whereupon said persons are sworn to true answer make touching their qualifications as jurors, and are examined by the court and for good cause shown the court excuses for the term, W. Crawford, H. W. Cuffell and L. L. Reeve, and the clerk is ordered to issue certificates to said persons and take their affidavits as to *per diem* and mileage, and the following person- being found qualified are accepted by the court, to-wit:

J. D. Stewart, J. B. Pryor, W. H. Cleveland, J. G. Huckaby, W. H. Reed, John Cresswell, George Clark, Ira D. Collins, G. W. Duggins, Joe Hines, H. G. Westbrook, T. H. Lear, E. D. Rickey, Enock Jarrell, P. W. Franzen, M. D. Chappelear.

Whereupon all prisoners in custody of the sheriff are brought into court and they and all persons on bond awaiting action of this grand jury and the Territory are notified in open court of their right of challenge to said jury or any member thereof, and none being interposed the court duly charges said jury, a bailiff is appointed and sworn to wait on said jury, which now retires to consider of such

matters as may properly come before them. Ordered that court stand adjourned till tomorrow morning at 9 a. m.

C. F. IRWIN, *Judge.*

24 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

Be it remembered, that on the 7th day of May, 1901, the same being the second judicial day of the district court in and for said county, district and Territory, for the regular May term, 1901, thereof in the district court in and for said county, district and Territory aforesaid, after same had been duly opened for the actual transaction of business the following proceedings among others were had, to-wit:

In re return of grand jury.

Comes now the grand jury into open court and answers present to the call of their names and all jurors being present the said jury by and through their foreman present two (2) indictments, which the court orders filed and numbered. And now the clerk in open court and in the presence of said jury files said indictments and numbers them Nos. 316 & 317 respectively, and said jury having further business before them, retire to consider thereof.

Ordered that court stand adjourned till to-morrow morning at 9 o'clock a. m.

C. F. IRWIN, *Judge.*

Indictment No. 317 is in words and figures as follows, to-wit:

25 Original.

Indictment, District Court.

In District Court, Washita County.

TERRITORY OF OKLAHOMA }
vs.
JOHN NEW, Defendant. }

Of the May term of the district court of the second judicial district of the Territory of Oklahoma, within and for Washita county in said Territory, in the year of our Lord one thousand nine hundred and one, the grand jurors, chosen, selected, empanelled and sworn, in and for the county of Washita, in the name and by the authority of the Territory of Oklahoma, upon their oaths present that John New, late of the county aforesaid, on the thirteenth day of April, in the year of our Lord one thousand nine hundred and one,

in the county of Washita and Territory of Oklahoma, aforesaid, did purposely, wilfully and feloniously, with malice aforethought, and without authority of law, and with a premeditated design then existing in the mind of the said John New, to effect the death of H. F. Doyle, then and there with a certain Winchester rifle loaded with gunpowder and divers leaden bullets, shoot a bullet into the body of him the said H. F. Doyle, and so inflicted and so made a mortal wound upon and in the body of said H. F. Doyle, of which mortal wound, so inflicted and so made, in the manner and form, and with the purpose aforesaid, the said H. F. Doyle, on said 13th day of April, one thousand nine hundred and one, and in said Washita county aforesaid, did die, as was by the said John New intended as aforesaid he should do, and so the grand jurors aforesaid, on their oaths aforesaid, do say and find that the said John New, in manner and form aforesaid and by the means aforesaid, did then and there purposely, wilfully, and feloniously, and of his malice aforethought, and without authority of law, and with the premeditated design to effect the death of him, the said H. F. Doyle, the said H. F. Doyle did kill and murder contrary to the form of the statute in
26 such case made and provided and against the peace and dignity of the Territory of Oklahoma.

T. A. EDWARDS,
County Attorney.

Endorsed on the back as follows:

Witnesses, W. A. Reeves, G. B. Trotter, Mrs. G. B. Trotter, James Lightfoot, T. J. Hampton, Al Kits, George Austin, Charles Trotter, Maria Doyle, Pat Primm, James Walker, Rose Primm, Charles Murray, H. W. Fitchett, Mr. King, James Blocker, Dr. McLain, Wallace King, J. M. Baker, J. W. Miller, Mr. Wilson, Mr. Stapp, Thos. J. Bryan, J. B. Cannon, Mrs. J. B. Cannon, Levi Primm, Jack Primm, James Berky, John Farris, Jewel Alexander, Wm. Campbell, Mr. Waldruff, John Haggard, W. L. Reeves, Solon Reeves. T. A. Edwards, county attorney.

317. Indictment. District court. Washita county. Territory of Oklahoma *vs.* John New, defendant. Indictment for murder. A true bill. W. H. Cleveland, foreman of the grand jury. Filed and presented in open court in presence of grand jury, May 7, 1901, by E. M. Hegler, deputy clerk. Rec'd aps. dt. Rec. p. 69, G. E. Wagner, dep. cl'k.

TERRITORY OF OKLAHOMA,
Second Judicial District, County of Washita, } ss:

Be it remembered, that in the district court of Washita county, second judicial district, Territory of Oklahoma, on the 8th day of May, 1901, the same being the third judicial day of the district court in and for said county, district and Territory, of the May term, 1901, thereof, after said court had been duly open- for the actual transac-

tion of business, the following proceedings among others were had, to-wit:

27 TERRITORY OF OKLAHOMA } vs. JOHN NEW. } #317.

Comes defendant in the custody of the sheriff into open court and is arraigned, the indictment read to him, and he states his true name as therein contained, waives statutory time to plead, and enters a plea of not guilty.

It is thereupon considered and ordered by the court that said cause be and hereby is set for trial Friday of this week, May 10th, 1901.

C. F. IRWIN, *Judge.*

Ordered that court stand adjourned till tomorrow morning at 9 o'clock, a. m.

C. F. IRWIN, *Judge.*

TERRITORY OF OKLAHOMA, *Second Judicial District, County of Washita,* } ss:

Be it remembered, that in the district court in and for the county of Washita, second judicial district, Oklahoma Territory, on the 10th day of May, 1901, the same being the fifth judicial day of the district court in and for said county, district and Territory, of the May term, 1901, thereof, after said court had been duly open- for the actual transaction of business, the following proceedings among others were had, to-wit:

28 TERRITORY OF OKLAHOMA } vs. JOHN NEW, Defendant. } No. 317.

Comes now the Territory by its attorneys and defendant in person and by his attorneys into open court. And now the Territory announces ready for trial and the defendant by his attorneys files his motion supported by affidavits for a continuance, which said motion is presented to the court, and the court being duly advised in the premises sustains said motion and grants said continuance, said motion and affidavits follow this page.

TERRITORY OF OKLAHOMA } vs. JOHN NEW. } No. 317.

It appearing to the satisfaction of the court that the jail of this county is insecure and in a poor sanitary condition and that the

above named defendant is in a serious physical condition and at the request of the county attorney,

It is therefore ordered, that the sheriff of this county forthwith transport said defendant to Canadian county, Oklahoma Territory, and deliver him to the sheriff of said county and take his receipt therefor.

It is further ordered, that the sheriff of Canadian county shall receive and confine said defendant in the county jail of said county until the further order of this court, and a certified copy of this order shall be his full warrant and authority for so doing.

C. F. IRWIN, *Judge.*

Ordered that court stand adjourned till Wednesday, May 15th, 1901, at 1.30 p. m.

C. F. IRWIN, *Judge.*

29 In the District Court of Washita County, Oklahoma.

TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Now comes the defendant and says he is not ready for trial, and cannot get ready for trial at this term of the court, and moves the court to continue this cause to the next term of the court, for the reasons set forth in the affidavits hereto attached.

H. M. FURMAN,
R. B. FORREST,
S. C. MASSINGALE,
Att'ys for Defendant.

TERRITORY OF OKLAHOMA,
Washita County.

In the District Court within and for the said County.

TERRITORY OF OKLAHOMA, Plaintiff,
vs.
JOHN T. NEW, Defendant.

Affidavit.

TERRITORY OF OKLAHOMA,
Washita County, ss:

R. B. Forrest, being first sworn in due form of law, upon his oath, deposes and says, that he is one of the attorneys employed to defend the above entitled action; that his employment dates from Tuesday,

the 7th day of May, 1901, that since said employment, this affiant has been almost constantly engaged in his duties as the attorney of several other litigants who have actions pending in the present term of this court, and he has, by reason of his required attention, to the said matters, had scarcely any time whatever to make preparation for the trial of this case; that he has been unable to have a conference with the defendant, both on account of his engagements in said other matters, above referred to, and on account of the confinement and the physical condition of the defendant, which
30 said physical condition, affiant is informed by reputable physicians, is such that the safety of defendant's health requires that he should not be brought to any mental strain, and affiant states that the only opportunity he has had to see and speak with the defendant up to the present time since his employment was on the occasion when the defendant was brought into court to be arraigned in this action. Affiant further states that his engagements above referred to with other matters to which his attention has been confined, in order that he might be enabled to attend to duties connected therewith, when the same should come before the court, has prevented affiant from opportunity to enter upon a careful and studious consideration of the matters of this case with his co-counsel herein. That he has had no opportunity to investigate the case, owing to the shortness of the time since his employment, and his professional engagements in connection with such other matters as he has herein referred to.

Affiant further states that he is informed by his co-counsel, from whom he has learned all that he knows about this case, that the difficulties existing between the defendant and the deceased have covered a series of years, and that the persons who are familiar therewith are located at different places within the State of Texas, and in the Territory of Oklahoma, and possibly elsewhere.

That the defense in this action will be that the defendant slew the deceased in the defense of his own life, that the deceased had made threats against the life of the defendant, on numerous occasions and at different places, that he had aggravated and worried the defendant, and threatened his life to such a degree that the defendant believed that his own life was in peril when he met the deceased, and at the time of the fatal hour. That to establish the defense it is essential that affiant and his co-counsel, should see and talk with the witnesses, who will be relied upon to establish this defense. That owing to the facts and circumstances herein stated and affiant's total inability to prepare for said trial, for the
31 reasons stated, this affiant is wholly unprepared to enter upon the defense of this case, at the present term of this court. And affiant states that he is aware of the fact that his co-counsel herein are also unprepared to enter into the trial of this case, at the present term of this court.

Affiant further states that the defendant and his friends are anxious that this case should be brought to a speedy trial, but

owing to facts herein stated, the case could not be tried at this term of the court, without injustice to the defendant. Affiant further states that this affidavit is not made for the purpose of delay, but that justice may be done. Further affiant saith not.

R. B. FORREST.

Subscribed and sworn to before me this 10th day of May, 1901.

E. M. HEGLER, *Clerk.*
[SEAL.] G. E. WAGNER, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Washita County, }

Personally appeared Henry M. Furman, who being duly sworn deposes and says, that he is of counsel employed to defend John T. New, upon the charge of murder now pending against him in the aforesaid Territory and county.

That he was employed to defend said New on the 7th day of the present month, that he at once had an interview with said New, for the purpose of getting ready to try cause, that he found said New in an exceedingly debilitated condition, both of body and mind; that affiant is informed by the said New and by the physicians who have attended him, that said New is just recovering from an attack of pneumonia, from which the said New has been suffering ever since the day after the commission of the homicide, with which the said New now stands indicted. Affiant states that he experi-
32 enced the greatest difficulty in obtaining from the said New an intelligent and connected statement of the facts of this cause; that affiant conversed with said New for about three hours before he could gather sufficient information to enable him to understand the merits of this case; that owing to the enfeebled condition of the mind and body of the said New it is impossible for the said New to keep his mind continuously upon any one subject.

That affiant in good faith believes if this cause is tried at the present term of the court the said New is not in such a mental and physical condition as will enable him to take the witness stand and testify in his own behalf. That affiant has been forbidden by reputable physicians who have examined said New from placing said New on the witness stand, at the present term of the court upon the ground that any undue excitement at this time to said New will be attended with the most serious consequences to him, and also upon the further ground that the said New is not in such a frame of mind owing to his said sickness, as would enable him to be a witness in this case.

Affiant says that the testimony of said New is material to the defense of said cause, in this, if said New, if able to take the witness stand would testify that the difficulty which resulted in the death of deceased, was of long standing; that said difficulty began in the

State of Texas, several years ago and that said New would testify to a number of transactions between deceased and himself and to a number of things said by deceased to said New which would be material to show the state of mind existing on the part of deceased, toward the defendant, and from which defendant would have reasonable ground to apprehend that it was the intention of deceased to kill defendant. That owing to the condition of the mind of the said New he is unable to give a statement of these facts in detail and therefore affiant is unable to give them. That said New was unable to state the names of all the witnesses by whom he could
33 prove said facts in detail.

Affiant says that among the more important facts stated to him by the said New was that said New was in Texas a short time prior to the homicide and that while there he was informed by a number of persons that deceased was in Texas during the month of December, 1900, and that while in Texas deceased had repeatedly threatened to kill this defendant, and had stated to a number of persons that such was his purpose and intention, and in connection with said threats, deceased applied the vilest epithets to the defendant. That said threats were communicated to this defendant when in Texas, by W. A. Powers, and divers other persons, who reside in said State, and that from said threats the defendant had reasonable ground to believe, and in good faith did believe, that it was the purpose and intention of deceased to take the life of defendant. That all of said witnesses reside without the jurisdiction of this court and in Collin county, Texas, and other portions of said State, and that owing to the shortness of time since the filing of this indictment, and before the expiration of this term of the court, counsel for defendant have been unable and will be unable to investigate said matters and prepare to take the depositions of said witnesses. That if this cause is tried at the present term of this court the defendant will be deprived of said evidence which is material to the defense of this cause.

Affiant further states that if said New was in a physical and mental condition to take the witness stand he would testify in substance that immediately prior to the time of the homicide, this defendant was on his own land where he had a right to be, and was attending his own business repairing a fence around his farm. That this defendant did not see deceased until he chanced to look down the road, passing his fence where he saw deceased, and one Reeves, coming toward where defendant was in a wagon. That said Reeves and deceased appeared so recognize defendant at the same
34 moment. That deceased immediately placed his right hand in his bosom, as though to draw a pistol. That the defendant in view of the threats that had been previously made, communicated to him, had reasonable ground to believe and in good faith did believe from the conduct of deceased that deceased then and there intended to kill defendant. That thereupon the defendant picked up a Winchester rifle, which he had with him, and fired at deceased.

That at the time defendant fired the shot, deceased had his right hand in his bosom, and appeared to be attempting to draw a pistol. That when defendant fired deceased jumped out of the wagon, but still kept his said hand in his bosom and appeared to be making a desperate effort to draw a pistol. That defendant expecting deceased to draw his pistol at any moment and believing in good faith that his life was in danger at hands of deceased, continued to fire at deceased until the fatal wounds were inflicted upon deceased. Defendant says that he is informed that the Government witnesses will testify that a pistol was found on deceased, pinned in his bosom in such a manner as required considerable effort upon the part of said Government witness to get said pistol away from body of deceased. Affiant says that the testimony of New in his own behalf is necessary because affiant is informed and believes that the Government's witness, Reeves will swear that the deceased did not attempt to draw his pistol, and did not make any hostile demonstrations towards defendant at the time of the homicide. Affiant further says that defendant cannot safely go to trial at this term of court because counsel for defendant were on the 9th day of May, 1901, served by the county attorney with the following list of witnesses to be used by the prosecution, to-wit: Green Trotter, Mrs. Trotter, Chas. Trotter, Dick Reeves, James Lightfoot, Ben Lightfoot, Maria Doyle, Patt. Prim, James Walker, Rose Primm, Chas. Munoy, George Rustin, A. Kitts, H. W. Fitchett, Mrs. and Mr. King, J. S. Blocker and Dr. McClain; that said witnesses are stangers to counsel for defendant, with one or two exceptions,

35 and that owing to the mental and physical condition of the defendant, counsel for defendant are unable to learn from him what will probably be the testimony of said witnesses, and that owing to the shortness of time counsel for defendant have been unable to learn what said witnesses will swear to, or to make any investigation as to the credibility of said witnesses, or their animus towards defendant, and that if said cause proceeds to trial at this term of the court, counsel for defendant will be largely groping in the dark, as to what they are called upon to defend against, and that therefore they will necessarily be unprepared to make a defense in this cause.

That counsel for defense has received information with reference to a number of matters which they believe to be material to the defense in this cause, but which, from the shortness of time, they have been unable to investigate and verify.

Affiant further states that both defendant and his counsel are in good faith anxious to try this cause at the earliest possible moment, and that they confidently believe that if this cause is continued to the next term of the court they will then be ready for trial, and will then be able to make a successful defense to this indictment. That this application for a continuance is not made for delay, but that justice may be done.

HENRY M. FURMAN.

Subscribed and sworn to before me this 10th day of May, 1901.

E. M. HEGLER,
Dist. Clerk.

[SEAL.] G. E. WAGNER, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
County of Washita, }

Personally appeared Dr. W. A. Evans, Dr. Ney Neal, and Dr. W. J. Hancock, who being duly sworn each for himself swears, that he is a regular practicing physician under the laws of Oklahoma Territory, and that the three together have this day carefully examined John T. New, now confined in the jail of Washita county, upon the charge of murder. That the said New is now in a very pre-
36 carious state of health. He is just recovering from an attack of pneumonia, which had been preceded by attacks of lagrippe and measles. He is now suffering with a serious bowel trouble, his vitality is very low, from his condition we are of the opinion that he is nearly verging on insanity, and that in justice to his health and also the merits of his case, it would be unsafe to place him upon trial. We do not believe that he is in condition to testify as a witness in an intelligent and reliable manner and we greatly fear that the excitement and strain of a trial would be attended with the most serious results to him.

W. A. EVANS, M. D.
NEY NEAL, M. D.
W. J. HANCOCK, M. D.

Subscribed and sworn to before me a notary public, in and for Washita county this 8th day of May, 1901.

[SEAL.] H. L. ROWLEY,
Notary Public.

My com. expires June 7, 1904.

Endorsed on the back: Territory of Oklahoma, *vs.* John T. New—Application of defendant for a continuance / Filed May 10, 1901. E. M. Hegler, clerk, G. E. Wagner, dep.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

In the Supreme Court, Oklahoma Territory, January Term, 1901.

Order Fixing Terms of Court for the Various Counties of the Second Judicial District.

Ordered by the court: That terms of the district courts for the various counties of the second judicial district, Territory of Oklahoma, be fixed as follows, to-wit:

For the county of Kingfisher, at Kingfisher, Monday, Feb. 11th, 1901.

For the county of Canadian, at El Reno, Monday, March 4th, 1901;

For the county of Cleveland, at Norman, Monday, April 15th, 1901;

37 For the county of Washita, at Cordell, Monday, May 6th, 1901;

For the county of Custer, at Arapahoe, Monday, May 20th, 1901.

It is further ordered by the court: That the clerk transmit a certified copy of this order, attested by his official signature and the seal of this court, to each of the district courts of the Territory and to the United States attorney and the United States marshal.

JNO. H. BURFORD,
Chief Justice.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the order made by said supreme court on the 9th day of January, 1901, fixing terms of court for the second judicial district of said Territory, as the same appears on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Guthrie, this 14th day of January, 1901.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

38 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

In the Supreme Court.

Order Fixing Terms of Court for the Second Judicial District.

Ordered by the court: That terms of district courts for the second judicial district of Oklahoma Territory, be fixed as follows, to-wit:

For the county of Custer, at Arapahoe, Monday, Sept. 30, 1901.

For the county of Washita, at Cordell, Tuesday, October 15th, 1901.

For the county of Canadian, at El Reno, Monday, Oct. 28, 1901.

For the county of Cleveland, at Norman, Monday, Nov. 25th, 1901.

It is further ordered by the court: That the clerk of this court transmit a certified copy of this order, attested by his official signature and the seal of this court, to each of the district courts of the Territory and to the United States attorney and the United States marshal.

JNO. H. BURFORD,
Chief Justice.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

UNITED STATES OF AMERICA, }
Territory of Oklahoma, } ss:

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the order this day made, fixing terms of courts in the second judicial district, as the same appears on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said court at Guthrie, this 7th day of September, 1901.

BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

39 TERRITORY OF OKLAHOMA, }
Second Judicial District, County of Washita, } ss:

Be it remembered, that in the district court in and for said county, district and Territory, in the matter of the change of place of confinement of John T. New, the following order was made by the judge of said court at his chambers in El Reno, Okla., on the 24th day of August, 1901, in words and figures as follows, to-wit:

In the District Court of Washita County, Oklahoma Territory.

TERRITORY OF OKLAHOMA }
vs. } Order of Court.
JOHN T. NEW, Defendant. }

The said defendant John T. New, having made application to this court that he might be removed from the jail of Canadian county to some other place of confinement, and it further appearing that the sheriff of Washita county and the county attorney of said Washita county have each given their consent to such removal.

Now, therefore, it is hereby ordered that the sheriff of Washita county, Oklahoma Territory, do remove the said John T. New from confinement in the jail of Canadian county, Oklahoma Territory, to

the jail located at Mangum, Greer county, Oklahoma Territory. That the said defendant be there confined until the convening of this court at the next regular term at which time said sheriff of Washita county shall have the said defendant confined in the jail of Washita county, Oklahoma Territory.

Signed at El Reno, August 24-h, 1901.

C. F. IRWIN,
Judge of the 2nd Judicial District, Oklahoma Ter.

Attest:
[SEAL.] E. M. HEGLER, *Clerk.*

Endorsed on back: Territory *vs.* New—Order to change defendant's place of confinement. Returned and filed October 12th, 1901) E. M. Hegler, clerk by G. E. Wagner, deputy.

40 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

In the District Court of said County.

In re assignment of the trial docket for the October term, 1901.

Order.

It is ordered: That the trial docket within and for the county of Washita, Territory aforesaid, be and hereby is set and assigned for trial as hereinafter set forth; that cases assigned for trial will be called for trial in the order of their setting and in the event the assignment for any day should be undisposed of at the end of said day, the same will be resumed the following day in order of setting, to-wit:

October 15th, 1901—1st day.

317, Territory of Oklahoma *vs.* John New.

* * * * * * *

C. F. IRWIN, *Judge.*

Attest:
E. M. HEGLER, *Clerk.*

TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, }

In the District Court of said District and Territory.

In the matter of drawing and summoning the grand and petit juries within and for the county of Washita, in said district and Territory, for the regular term, 1901, thereof.

Order.

Ordered: That the clerk of this court shall proceed at once to have drawn and summoned according to law, eighty persons possessing the qualifications of jurors, to serve as such within and for
41 the county of Washita, district and Territory aforesaid, at the regular October term, 1901, of the district court thereof, and place the summons therefor in the hands of the sheriff of said county for service; said summons to command said jurors to be and appear at Cordell in said county on the 15th day of October, 1901, at 9 o'clock a. m. thereof.

It is further ordered; That the first 20 persons so drawn shall be forthwith inserted in a summons to be served as grand jurors and the remaining persons so drawn shall be inserted in a summons and served as petit jurors; that the said sheriff shall use due diligence and promptness in service and make affidavit to his return and provided the full number are not summoned additional drawing shall be had in all respects as the original drawing until the full number provided for in this order are served.

Witness my hand at El Reno, this September 30th, 1901.

C. F. IRWIN, *Judge.*

Attest:
E. M. HEGLER, *Clerk.*

TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

In the District Court.

In the matter of the drawing of the grand and petit juries within and for said county for the regular October term, 1901, of the district court thereof.

Be it remembered, that on this 1st day of October, 1901, pursuant to an order of the judge of said district court heretofore made and entered, comes John W. Miller, sheriff of said county, and G. D. Coker, county clerk of Washita county, Oklahoma Territory, said G. D. Coker having in his custody the jury box ofsaid county and

together with E. M. Hegler, clerk of the district court of said district by G. E. Wagner, his duly appointed, qualified and acting deputy for said county, proceed in due form to draw from said
42 jury box eighty names to constitute the grand and petit juries of the district court for the October term, 1901, of said court as commanded by said order. And now said jury box having been thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents and said officers proceed to draw alternately therefrom ballots in the following order: J. J. Barnes, W. A. Chappelear, J. T. Flake, S. V. Force, J. H. Squires, W. H. Reed, H. F. Browers, D. D. Weins, B. E. Bryant, S. D. Dodd, N. H. Johnson, J. P. Timmons, B. F. Davis, T. B. Page, B. D. Walker, L. D. Green, G. B. Frothe, W. F. Olliver, E. S. Rigsbee, John H. Dick, Andrew Whitby, H. Bonham, J. W. Jothan, W. F. Barnes, J. L. Hoover, T. M. Meler, W. S. Browning, O. A. Morgan, W. P. Ratliff, R. B. Langford, John Mitchell, John Ctaes, James Rodgers, Henry Koch, John Reeder, N. W. Cook, T. Orbison, C. S. Shive, J. W. Whaley, J. S. Lisle, F. C. A. Raasch, J. B. Messinger, Samuel Hawkins, J. B. Hosteter, W. S. Petty, L. C. McBee, J. T. Maddux, W. Dalton, J. R. Vivian, S. A. Stout, J. M. Snapp, A. P. Lockhart, L. H. Jones, R. W. Crowell, J. P. Fast, W. F. Reese, Frank Morrison, C. F. Hartrouft, C. W. Meler, R. L. Thompson, Sam Williams, J. L. Nichols, W. M. Thrasher, J. M. Kendall, B. T. Bagby, John A. Smith, W. H. Midcalf, J. W. Penn, A. S. Shoford, J. H. Breeding, W. W. Neeley, B. C. Warren, S. R. Stephens, R. G. Cox, J. D. Corbin, A. B. Jones, J. B. Henry, J. S. Hatchett, John Franklin, J. P. Nichols, and now the clerk prepares summons from said ballots as ordered, and delivers them to the sheriff of said county for service and in the presence of said officers destroys said ballots by burning.

And afterwards, to-wit, on the 10th day of October, 1901, comes the sheriff and makes return of the grand jury venire heretofore issued and delivered in the words and figures as follows, to-wit:

"Received this writ this 1st day of October, 1901, and served the same on the within named W. A. Chappelear, J. T. Flake, S. V. Force, J. H. Squires, W. H. Reed, H. F. Browers, D. D. Weins, B. E. Bryant, S. D. Dodd, J. P. Timmons, B. F. Davis, L. D. Green, W. F. Olliver, E. S. Rigsbee, John H. Dick, by leaving a certified copy of the original venire with each of the said jurors and reading them the original venire.

JOHN W. MILLER, *Sheriff.*

43 TERRITORY OF OKLAHOMA, } ss:
Washita County, }

John W. Miller, sheriff, after being duly sworn deposes and says that he received the within grand jury venire on the 1st day of October, 1901, and served the same on the foregoing named jurors named in said venire, in the manner and form above set forth, and

that he return as unfound and unserved the following named jurors, to-wit: J. J. Barnes, not found in county; T. B. Page could not be found in the county; B. D. Walker could not be found in the county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 10th day of October, 1901.

E. M. HEGLER,
District Clerk.

[SEAL.] G. E. WAGNER, *Deputy.*

And afterwards, to-wit, on the 10th day of October, 1901, comes John W. Miller, sheriff, and makes return of the petit jury venire in words and figures as follows, to-wit: "Received this writ on the 1st day of October, 1901, and served the same on the within and following named H. Bonham, J. W. Johnson, W. F. Barnes, J. L. Hoover, T. M. Meler, W. S. Browning, O. A. Morgan, W. P. Ratliff, R. B. Langford, John Mitchell, John Cates, James Rodgers, Henry Kock, John Reader, N. W. Cook, T. Orbison, J. W. Whaley, J. S. Lisle, F. C. A. Raasch, Samuel Hawkins, J. B. Hosteter, W. S. Petty, L. C. McBee, J. T. Maddux, W. Dalton, J. R. Vivian, S. A. Stout, J. M. Snapp, L. H. Jones, R. W. Crowell, J. P. Fast, W. F. Reese, Frank Morrison, C. F. Hartrouft, J. L. Nichols, W. M. Thrasher, J. M. Kendall, B. T. Bagby, John A. Smith, W. H. Midcalf, W. W. Neeley, B. C. Warren, S. R. Stevens, R. G. Cox, J. D. Corbin, A. B. Jones, J. B. Henry, J. S. Hatchett, John Franklin, J. P. Nichols, J. H. Breeding, by leaving a certified copy of the original venire with each juror; and after diligent search and inquiry returns as unfound and unserved the following within named jurors, Andrew Whitby, who is deceased, C. S. Shive, no person by such name could be found
44 in the county; J. B. Messinger, has moved to Nebraska, C. W. Meler could not be found in the county; R. L. Thompson has removed from the county; Sam Williams has removed from Washita county; J. W. Penn has moved from Washita county; A. S. Shuford has moved to North Carolina; A. P. Lockhart, not served, has moved from county.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 10th day of October, 1901.

E. M. HEGLER,
District Clerk.

[SEAL.] G. E. WAGNER, *Deputy.*

And afterwards, to-wit, on the 10th day of October, 1901, come John W. Miller, sheriff, and G. D. Coker, county clerk of Washita county, Oklahoma Territory, said county clerk having in his custody the jury box of said county, and together with E. M. Hegler, clerk of the district court of said district by G. E. Wagner, his duly ap-

pointed qualified, and acting deputy for said county, proceed in due form to draw from said jury box fourteen names to complete the grand and petit jury panels of the district court for the October term, 1901, of said court as heretofore ordered. And now said box having been thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents of said box and said officers proceed to draw alternately therefrom ballots in the following order, to-wit: S. Sherod, Oscar Ford, W. H. Combs, E. D. Reed, W. B. Cox, A. Hughes, N. C. Browning, David Kiehn, A. M. Hollis, J. G. Bryne, A. J. Boydston, W. F. Smith, Daniel Webster and George Spivey, Whereupon the first five names so drawn are inserted in a grand jury venire, and the remaining nine names are inserted in a petit jury venire and said venires are placed in the hands of the sheriff for service, and the ballots containing said names are destroyed by burning in the presence of said officers.

45 And afterwards, to-wit, on the 12th day of October, 1901, comes the sheriff and makes return of the second grand jury venire in words and figures as follows, to wit: "Received this writ on the 10th day of October, 1901, and served the same on the within named S. Sherod, Oscar Ford, W. H. Combs, E. D. Reed and W. B. Cox, by reading to them the original venire and delivering to them a certified copy of the same.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 12th day of October, 1901.

E. M. HEGLER,
District Clerk,
[SEAL.] By G. E. WAGNER, *Deputy.*

And afterwards, to-wit, on the 12th day of October, 1901, comes the sheriff and makes return of the second petit jury venire heretofore issued and delivered to him in words and figures as follows, to-wit; "Received this writ on the 10th day of October, 1901, and served the same on the within named A. Hughes, N. C. Browning, David Kiehn, A. M. Hollis, J. G. Byrne, A. J. Boydston, W. F. Smith, Daniel Webster, by reading to them the original venire and delivering to them a certified copy of the same. George Spivey could not be found in the county. He has moved therefrom.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 12th day of October, 1901.

E. M. HEGLER,
District Clerk.
[SEAL.] G. E. WAGNER, *Deputy.*

46 And afterwards, to-wit, on the 12th day of October, 1901, comes John W. Miller, sheriff, and G. D. Coker, county clerk

of Washita county, Oklahoma Territory, said county clerk having in his custody the jury box of said county and together with E. M. Hegler, the clerk of the district court of said district by G. E. Wagner, his duly appointed, qualified, and acting deputy for said county, proceed in due form to draw from said jury box one name to complete the petit jury panel for the October term, 1901, of the district court for said county as heretofore ordered. And now said box being thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents thereof, and said county clerk, whose alternate time it is to draw, draws from said box the following named ballot, to-wit: Morris Farr, and said name is inserted in a petit jury venire and placed in the hands of the sheriff for service, and said ballot is destroyed by burning in the presence of said officers.

And afterwards, to-wit: on the 14th day of October, 1901, comes John W. Miller, sheriff, and makes return of the third petit jury venire heretofore issued and delivered to him, in words and figures as follows, to-wit: "Received this writ on the 12th day of October, 1901, and after two days' diligent search have failed to find Morris Farr in the county, he has moved therefrom.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 14th day of October, 1901.

[SEAL.] E. M. HEGLER,
District Clerk.
G. E. WARNER, *Deputy.*

47 And afterwards, to-wit, on the 14th day of October, 1901, comes the heretofore named sheriff and county clerk of Washita county, Oklahoma Territory, said clerk having in his custody the jury box of said county, and together with E. M. Hegler, clerk of the district court of said district by G. E. Wagner, his duly appointed, qualified, and acting deputy for said county, proceed in due form to draw from said box one name to complete the petit jury panel of said court for the October term, 1901, thereof, as heretofore ordered. And now said box being thoroughly shaken so as to intermingle said ballots, is placed in such a position as not to expose the contents thereof and said sheriff, whose alternate time it is to draw, draws therefrom the following ballot, to-wit: John Roth. And now the clerk inserts said name in a petit jury venire and places same in the hands of the sheriff for service, and said ballot is destroyed by burning.

And afterwards, to-wit: on the 14th day of October, 1901, comes the sheriff and makes return of the fourth petit jury venire in words and figures as follows, to-wit: "Received this writ on the 14th day of October, 1901 and served the same on the within named John

Roth by reading to him the original venire and delivering to him a certified copy thereof.

JOHN W. MILLER, *Sheriff.*

Subscribed and sworn to before me this 14th day of October, 1901.

E. M. HEGLER,
District Clerk.

[SEAL.] G. E. WARNER, *Deputy.*

48 TERRITORY OF OKLAHOMA, }
Second Judicial District, County of Washita, } ss:

Be it remembered that in the district court in and for the county of Washita, district and Territory aforesaid, on the 15th day of October, 1901, the same being the first judicial day of the district court in and for said county, district and Territory, of the regular October term, 1901, thereof, after said court had been duly opened for the actual transaction of business the following proceedings among others were had, to-wit:

In the matter of empanelling the petit jury.

Comes now into open court the following named persons heretofore drawn and summoned as petit jurors for the October term 1901, term of this court, to-wit: H. Bonham, J. W. Johnson, W. F. Barnes, J. L. Hoover, T. M. Meler, W. S. Browning, O. A. Morgan, W. P. Ratliff, R. B. Langford, John Cates, James Rodgers, Henry Koch, John Reader, N. W. Cook, T. Orbison, J. W. Whaley, J. S. Lisle, F. C. A. Reasch, Samuel Hawkins, J. B. Hosteter, W. S. Petty, L. C. McBee, J. T. Maddux, W. Dalton, J. R. Vivian, S. A. Stout, J. M. Snapp, L. H. Jones, R. W. Crowell, J. P. Fast, W. F. Reese, Frank Morrison, C. E. Hartrouft, J. L. Nichols, W. M. Thrasher, J. M. Kendall, B. T. Bagby, John A. Smith, W. H. Midcalf, W. W. Neeley, B. C. Warren, S. R. Stevens, C. G. Cox, J. D. Corbin, A. B. Jones, J. B. Henry, J. S. Hatchett, John Franklin, J. P. Nichols, J. H. Breeding, A. Hughes, N. C. Browning, David Kiehn, A. M. Hollis, J. G. Byrne, A. J. Boydston, W. F. Smith, Daniel Webster and John Roth.

49 Whereupon said persons are sworn to true answers make to questions propounded to them touching their qualifications as jurors and are separately examined by the court, and now J. W. Johnson, N. W. Cook, T. Orbison, B. C. Warren, and John Roth are excused for the term on account of sickness; R. B. Langford and John A. Smith on account of age, the privilege being demanded, and S. R. Stevens on account of being a post master. And the remaining persons being found qualified are by the court accepted as the petit jury panel for the term and ordered placed in the jury box.

Ordered that court stand adjourned until tomorrow morning at 9 a. m.

C. F. IRWIN, *Judge.*

50 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

Be it remembered that on this 15th day of October, 1901, the same being the first judicial day of the district court in and for said county, district and Territory, for the October term, 1901, thereof, the court having been duly opened for the transaction of business, the following proceedings among others were had, to-wit:

TERRITORY OF OKLAHOMA } No. 317.
vs.
JOHN NEW, Defendant.

Comes now the Territory by T. A. Edwards, county attorney of Washita county, and Smith & Sitterley, L. R. Cowan, and —— Abernathy, assistant prosecutors and defendant in person into open court and by his attorneys, Henry Furman, Forrest & Lowe, and S. C. Massingale. And now the court grants the prosecution leave to endorse additional names upon the indictment upon serving a list thereof to the defendants. And now both sides announce ready for trial and said cause being regularly reached, the court directs a jury drawn and empaneled to try said cause. Whereupon the clerk proceeds to draw said jury from the regular petit jury panel and the right of challenge for cause and peremptory being duly exercised by respective parties hereto, the following named jury is selected, empaneled and sworn to try this cause to-wit: W. F. Reese, John Cates, J. L. Hoover, John Franklin, W. S. Petty, J. S. Hatchett, A. M. Hollis, John Reader, A. B. Jones, W. F. Barnes, Daniel Webster and J. L. Nichols. And now the prosecution reads the indictment to the jury and informs them of defendant's plea of not guilty
51 thereto. And the hour for adjournment having arrived, the court duly admonishes said jury, appoints and swears two bailiffs and said jury retire in their charge.

Ordered that the sheriff furnish meals and lodging to the jury and bailiffs during the trial and consideration of this case.

Ordered that court stand adjourned till tomorrow morning at 9 o'clock a. m.

C. F. IRWIN, *Judge.*

52 TERRITORY OF OKLAHOMA, } ss:
Second Judicial District, County of Washita, }

In the District Court in and for said County, District, and Territory.

Be it remembered that on the 16th day of October, 1901, the same being the 2nd judicial day of the district court in and for said county, district, and Territory aforesaid, of the regular October, 1901, term,

thereof, the court having been duly opened for the transaction of business, the following proceedings among others were had to-wit:

TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant. } #317.

Comes now the prosecution by its attorneys and defendant in person into open court and by his attorneys; comes also the jury in charge of their sworn bailiffs and all being present the trial of this cause is resumed. And now the Territory makes its statement of case and at request of parties the rule is invoked as to witnesses, except as to wife of defendant and wife of deceased and character witnesses. And now the Territory introduces its evidence and rests. Thereupon the defendant makes his statement and introduces his evidence and rests. And there being no evidence in rebuttal, the court instructs said jury in writing. And now defendant files his bill of exceptions No. 1, which is allowed by the court. Thereupon the Territory makes its opening argument and being concluded the defendant makes his argument and the hour for adjournment having arrived, the court duly admonishes said jury, and swears the bailiffs and said jury retire in their charge.

Ordered, that court stand adjourned till tomorrow morning at 9 a. m.

C. F. IRWIN, *Judge.*

53–157 That a full and complete transcript of the evidence introduced and the proceedings had in said cause at the trial thereof, as shown by a transcript of the shorthand notes of the official court stenographer of said court, is as follows to-wit:—

* * * * * * *

158 By the COURT: Swear the jury, Mr. Clerk.

By the CLERK: Stand up gentlemen.

Jury stand and are sworn to try the cause according to the law and the evidence.

By the COURT: Let the case be opened on the part of the Territory and the indictment read.

The county attorney reads the indictment to the jury, and informs the jury that the defendant has pleaded not guilty thereto.

The county attorney makes his statement to the jury.

Here the defendant by his counsel waives his opening statement at this time.

By the COURT: Gentlemen of the jury we will adjourn now until to-morrow morning. Observe what the court has already said to you about not talking about the case or allowing any one to talk about it in your presence or to you. Keep your minds free from any opinions or impressions until the cause is finally submitted to you.

159 By the COURT: Open court, Mr. Crier.

By the CRIER: Oyes, oyes, oyes,—the honorable district court in and for Washita county, Oklahoma Territory, is now in session.

By the COURT: Call the jury, Mr. Clerk.

The clerk calls the jury. All answer present. The defendant present, and by counsel. The Territory present by its counsel.

By the COURT: You may proceed gentlemen, if you are ready.

By the COUNSEL FOR THE DEFENDANT: With the permission of the court we will now make our opening statement.

By the COURT: You may make it at this time if you wish.

Here the counsel for the defendant makes his opening statement to the jury.

By the COUNSEL FOR THE TERRITORY: We ask leave of the court at this time to endorse the name of one additional witness for the Territory on the indictment.

By the COURT: Let it be endorsed by serving a copy of the same on the counsel for the defendant.

To which the defendant excepts. Exception allowed.

By the COUNSEL FOR THE TERRITORY: We will ask the court to enforce the rule excluding the witnesses from the room.

By the COURT: Let the rule be invoked with the exception of deceased's wife and defendant's wife. All the other witnesses may be excluded.

By the COUNSEL FOR THE DEFENDANT: We have certain character witnesses here your honor. I presume the rule will not be invoked as to them.

By the COURT: No they will be permitted to remain in the room. You had better call all the other witnesses and have them sworn.

Here the witnesses for the Territory and the defendant are called and sworn and instructed by the court as to the rule excluding them from the room and also from talking about or discussing their testimony or what they will or have sworn to.

160 By the COURT: Call your witnesses Mr. Edwards.—Proceed with the case.

Mr. G. E. TROTTER called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by Mr. T. A. EDWARDS, county attorney:

Q. State your name.

A. Trotter is my name.

Q. Where do you reside?

A. I live east of here, near Combs.

Q. Were you living out there on the 13th day of April, 1901, this year?

A. Yes sir.

Q. Are you acquainted with the defendant, John T. New?

A. Yes sir.

Q. Were you acquainted with the deceased, H. F. Doyle?
A. Yes sir.
Q. I will ask you to explain to the jury the situation of the country. The proximity of your house to the house of the defendant, John T. New, and the deceased, H. F. Doyle?
A. New's house is a—is north and a little west, and Doyle's is a little north and east.
Q. Do you live on a public road?
A. Yes sir.
Q. Which way does that road run?
A. East and west.
Q. Which side of the road?
A. South side.
Q. How far from your house is the house of the defendant, New?
A. Well it is a little over one half mile.
Q. In what direction?
A. A little north of west, a little north of west, a little west of north.
161 Q. In what direction from your house is the house of the deceased, Doyle?
A. East and a little north.
Q. Look at this diagram and state if it is a correct representation of that locality?

Handing the witness a diagram, marked Exhibit A.

A. Yes sir I think that is correct as I know.

(Here the attorney puts the diagram on an easel and asks the witness to step down to it. Here the witness walks down to the map.)

Q. Now this is Combs. (Indicating on the map.)
A. Yes sir.
Q. This is the section line now. (Indicating.) This is the section line going east from Combs towards Doyle's.
A. Yes sir.
Q. How far is it from Combs down to your place? This is the next section line. (Indicating.)
A. Yes sir.
Q. Now show the jury the location of the defendant's residence.
A. It is right here. (Indicating on the map.)
Q. Where is your residence?
A. Right here. (Indicating.)
Q. Where is the residence of the deceased?
A. This is it. (Indicating.)
Q. Now you say it is one half mile from here down to this section line. (Indicating.)
A. It is across a quarter section.
Q. This is north, and this south and this east and this west. (Indicating on the map.)

A. Yes sir.

That is all you can be seated. (Witness resumes witness stand.)

162 Q. Locate the residence of Mr. King while you are locating there.

A. It is here. (Indicating on the map.)

Q. Is that correct?

A. Well no sir. He lives nearer the center.

Q. Is that right?—(Indicating on the map.)

A. Yes sir that would be about right.

Q. Is this the north and south section line running here? (Indicating.)

A. It is open from this section line south, it is closed along here. (Indicating.)

Q. Unopened?

A. Yes sir.

Q. And it is open south here? (Indicating.)

A. Yes sir.

Q. Did you see the defendant New and the deceased Doyle on the 13th day of April last, 1901.

A. Yes sir.

Q. You may go on and tell to the jury in your own way what you saw at that time?

A. Well on that day I went to the post office, Woods to get my mail, and stayed there until after the mail came in, and I got my mail and started down home, and me and Mr. Primm, I think Jack Primm, I think the youngest one of the men and Mr. I do not think of his name, another man leading a horse, was coming down the road together. I came to my house and they went on and I went in, and was a reading the paper. And Mr. Kites came to my house with a wagon and called for some hay that I let New have, and I went down to about the hay stack, to show him how to get in without running over some trees. I heard some shooting commence up on the section line, west of my house. And I heard a ball go across the field and heard it hit the ground. I did not know who

163 it was. I did not know whether it was a drunk or a team running away and trying to shoot the horses and stop them or what, and these two men had not come into my mind yet at all. I said to my boy, he was out south of the house, putting a planter on the lister, I said Come around the house, those fellows might hit you. I went to the house. I thought I would step to the corner of the house and see who it was. I saw Doyle's team coming by the house, I knew they had got into trouble. That was the first I thought of them. I went to see who it was. I saw Doyle. I heard a gun fire, and he grabbed his right leg, and went down on his right knee. And he ris and he went on. I stepped back some. And then I stepped up and saw Doyle coming through the fence, he said Do not let him kill me, I looked again and saw New running down the fence on the inside of his pasture. I was in range and I

ran behind the house, and Mr. Doyle still holding to his leg and running for the house. He did not stop. I went out and thought I would stop New. I was getting over my fence and he his. And I met him in the road. I said John this will never do, he slung me loose and swung round, he said with an oath Turn me loose.

Q. What did he say? Give his language.

A. He said, God damn you turn me loose. And slung me loose. I followed him. And I overtook him and my wife met him. When she met him I overtook him. And we took hold of him and we went in the room. And my wife said, Don't kill him, and he said Turn me loose and I won't. She turned him loose. And I expected them to go to shooting. I said Let's go out. And we got out to the dugout and I heard a shot, and I turned and looked and saw New standing in the door. And he went out to the wagon and took out a horse and got on it and went, I came around the house, he rode west, and about that time Mrs. Doyle came up. And she started around to
the back door and I said Come to the front door. And Gracie
164 Doyle followed her and I followed Gracie. And she said,
Throw him on the bed. I took the mattress off. I said Pull him over. I said He is dying. I walked around the house. And she walked around the house a piece, and she and Gracie went out. And Gracie went in and went to her father and taken his knife and pocket book out and gave it to one of the Primms boys. And stood there in the yard and rubbed the blood off her hand.

By the COUNSEL FOR THE DEFENDANT: We object to that. We ask that that be stricken out.

By the COURT: Sustained. Let that in reference to the blood be stricken out.

A. And Mrs. Doyle commenced taking on.

Interrupted—By COUNSEL FOR THE DEFENDANT: Do not tell that.

By the COURT: Do not tell that.

A. Well the body was turned over in the mattress and laid there until the coroner's jury came. So far as I know. After some men came in and took charge of the body I went into the dug out. I did not go in there in the house any more until I was called before the jury.

Q. Now you say that you was out at the crib or barn when the shooting began?

A. No sir.

Q. Did you not state that you was at the hay stack.

A. I—no sir I had been there and started to the house.

Q. When you heard the shooting begin?

A. Yes sir.

Q. How many shots were fired?

A. I do not know.

Q. About how many?

A. I think five or six in all.

Q. What was the first thing you saw of these parties after the shooting began? What was the first sight you had?

165 A. Mr. Doyle was the first sight.

Q. Where was he?

A. Outside the fence, near my fence, upon the outside in the section line. Nearest to my fence in the section line.

Q. Where was New?

A. I had not seen him.

Q. Where was he when you first saw him?

A. Inside his pasture coming down his fence.

Q. Across the section line?

A. Yes sir on the inside of his fence.

Q. What did he have?

A. A gun.

Q. What kind of a gun?

A. I would not swear.

Q. What was said by the deceased to you?

A. The only word he ever spoke to me he said Do not let him kill me. He said Mr. Trotter do not let him kill me, just as he came to the fence.

Q. Now what was the condition of the deceased when you met him?

A. He had his hand hold of his knee—that way—(indicating)—and when he walked he would grab his knee that way with both hands.

Q. Did you see any blood?

A. Yes sir.

Q. Where?

A. I saw blood from about six feet from the fence.

Q. Did you see any on his person?

A. Yes sir.

Q. Where?

A. Over his shoes and on his pants leg at the bottom.

Q. How far was the defendant from the deceased when you first saw them?

166 A. I suppose something over one hundred yards. That is New was one hundred yards from Doyle.

Q. At what gait was New going? Was he running or walking?

A. I cannot state. I did not pay that much attention to the defendant New.

Q. Where did you meet New?

A. In the road.

Q. How far from the house?

A. I suppose thirty or forty or maybe fifty yards. Maybe not so far. My house is the width of the section line from the road. We met some where near the middle of the road.

Q. Tell all that passed between you and the defendant New when you met him?

A. Nothing passed only as I took hold of him I said John, this will never do, and he slung me loose and went on.
Q. At what gait was he going?
A. Pretty fast.
Q. Running?
A. I do not know whether he was running or going in a fast walk.
Q. He slung you loose?
A. Yes, sir.
Q. In what direction did he go?
A. He went around me and went on.
Q. What direction?
A. Towards the house.
Q. Did you go after him?
A. Yes sir.
Q. Did you catch him? Did you try to catch him?
A. Yes sir.
Q. How close to your house was it that your wife met him?
167 A. It was in the yard.
Q. How close to the house?
A. About as far again as across this rostrum from the house.
Q. You pursued him until he met your wife?
A. Yes sir.
Q. Could you catch him?
A. I did not.
Q. Tell all that passed between New and your wife when they met.
A. I do not know as I can. If there was a word spoken until we got to the door I do not know it. Not ary one.
Q. When did you get hold of him after he first broke loose?
A. Not very far from the room door.
Q. After your wife had taken hold of him?
A. Yes sir.
Q. Did you both, you and your wife have hold of him until he got to the door?
A. I do not suppose over three feet from the door. I got hold of him.
Q. What passed when you got to the door?
A. Nothing said at all. After we got in the room my wife said For God's sake do not kill him in the house. Maybe she said that twice and he said Turn me loose and I wont.
Q. You was in the room?
A. Yes sir.
Q. And he and your wife?
A. Yes sir.
Q. What did you do then?
A. My wife turned him loose and he opened the door.
Q. You was in the side room?

A. Yes sir. And he opened the door leading into the main room.

Q. What was done then?

A. I turned him loose and said Sue let's get out of here.

168 Q. Where did he go?

A. I do not know. I suppose that he went into the house.

Q. What did you do?

A. Went out to the dug out. I heard a gun fire.

Q. When? Where?

A. In the house.

Q. What did you next see?

A. I stepped around the dugout and saw New standing in the door.

Q. This same door?

A. No sir. I mean the side room door.

Q. What did he do then?

A. He went on the north side of the house and then to the wagon.

Q. What did he have in his hand?

A. A gun.

Q. Whose wagon was that?

A. I do not know, a wagon that his hired man had brought down there.

Q. He took a horse out of the wagon and got on it?

A. Yes sir.

Q. Which way did he go?

A. Back west.

Q. The direction that he came from?

A. Yes sir.

Q. Rode back in that direction?

A. Yes sir.

Q. Where did you next see him?

A. Coming back.

Q. From west going east?

A. Yes sir.

Q. Pass your house?

A. Yes sir.

Q. Where did he go?

169 A. Down to the wagon where the horses fell.

Q. Where from the house?

A. Something near middle ways between my house and Mr. Doyle's.

Q. Whose wagon was it?

A. I do not know. I suppose the wagon that Doyle had been driving.

Q. What did he do?

A. He rode up and looked in the wagon and turned and rode back west.

Q. Did you see anything more of him?

A. He rode back west. And Mrs. Doyle asked me to go and see

if Dick was in the wagon. And I went down and came back and him and Mrs. New, was standing there and Lightfoot had just left.

Q. She said see if Dick is in the wagon. Who is Dick?

A. Dick Reeves.

Q. Her brother?

A. Yes sir.

Q. Did you look?

A. Yes sir.

Q. When did you go in the house?

A. After Mrs. Doyle went in.

Q. What did you find?

A. I found Mr. Doyle sitting in the house, his hands in his lap and his feet stretched out.

Q. Did you see any wounds?

A. Yes sir a hole in his jaw about here. (Indicating).

Q. Any other, any other marks about his person?

A. No sir.

Q. Did he have his hat on?

A. I do not think he did. I am not certain about that though. I would not say for certain.

170 Q. Was he sitting down on the floor?

A. Yes sir with his legs out straight.

Q. Let the table represent the bed and the windows the door and show the jury where he was.

A. The door open something near about two feet I suppose between the foot of the bedstead and the door, is something near two feet, maybe more and maybe not so much. The door open toward the bed, and he was sitting down with his back to the wall, and his feet stretched out straight, and his hands in his lap, and his head bowed over on his breast.

Q. In what county was that and when?

A. In Washita county. It was as well as I can recollect about the 13th day of April.

Q. What year?

A. 1901.

Q. In what Territory?

A. Cheyenne Territory, I believe.

Q. That happened in Oklahoma Territory did it not?

A. Yes sir. I said in 1901 I do not know about that. I believe it was.

Q. It was last April was it not?

A. Yes sir.

Q. Mr. Trotter did you go after the shooting to the place where you thought the shooting was done?

A. I went the next morning.

Q. And what did you find?

A. I did not find anything except some blood there in the road. I saw some tracks there.

Q. How far, do you know where the gate is that leads from the section line into the field that goes to New's house?

A. Yes sir.

171 Q. How far is that from your house?

A. Something near four hundred yards, three hundred and something.

Q. Where was this blood and those tracks from that gate?

A. Well it was as near as I can tell right opposite the gate.

Q. And about three hundred and some odd yards from your house?

A. Yes sir.

Q. Now indicate that gate on the map for the jury.

A. The gate would be about there. (Indicating.)

Q. And it is about four hundred yards from this gate down to your house?

A. Yes sir. Something near that.

Q. Did you have a turnip patch?

A. Yes sir.

Q. Where was it?

A. Right along in there. (Indicating.)

Q. Now after the defendant New went down to the wagon as you have stated he passed back west?

A. Yes sir.

Q. Did he say anything as he passed?

A. Yes sir.

Q. What?

A. He said to come out that he wanted to see me.

Q. He was out in the road?

A. Yes sir.

Q. Horse back?

A. Yes sir.

Q. What did you tell him?

A. I said that I did not want to talk with him. And he said all right and passed on.

Q. You went down and looked in the wagon?

A. Yes sir.

Q. What did you find?

172 A. Some chairs and some quilts. That is all I recollect looking for *that I all I recollect looking for* or seeing.

Q. Some quilts and chairs?

A. Yes sir.

Cross-examination by H. M. FURMAN, counsel for the defendant:

Q. Was there any weapons on Doyle after you found him dead?

A. I did not see any. They told me there were.

Q. You did not make any examination?

A. No sir.

Q. How long before the justice of the peace, Squire Hampton, came?

A. I suppose two hours. Maybe not so long.

Q. Had the body been moved before he came?

A. Not only it had been pulled over on the bed.

Q. You made no examination for weapons at all?

A. No sir.

Q. When Mr. New went in the room where Doyle was, just as he went in you and your wife left?

A. Yes sir.

Q. Where did you go?

A. West of the dugout.

Q. Had you got in before you heard the shot?

A. I did not go in. I went west of it.

Q. How far had you traveled after leaving the house before you heard the shot?

A. I suppose something near thirty feet.

Q. Maybe more.

A. Thirty feet, not more. I do not recollect just how close I was standing to the dug out. The dug out from end to end is about thirty feet long, and about fourteen feet space between the door and the dugout, and we went west of it which would throw us something more probably more than thirty feet.

173 Q. What made you leave?

A. I was afraid I would get shot.

Q. From which way?

A. From in the house.

Q. Who was you afraid of being shot by?

A. I did not know but what Doyle would go to shooting, and from where we were standing I did not know he was as liable to hit us as Mr. New.

Q. Do you know anything about the circumstances under which this shooting began west of you?

A. No, sir.

Q. Do not know anything about it?

A. No, sir; not at all.

Q. What size was that room that you say you and your wife and Mr. New went into, a shed room or a back room?

A. Yes, sir, that was a shed room or a back room.

Q. What size was the room that Doyle was in?

A. A fourteen-foot room.

Q. Fourteen-foot square?

A. Yes, sir.

Q. I will ask you as to whether or not that house has a window to the west?

A. No, sir.

Q. No opening to the west?

A. No, sir.

Q. No window in the west of the side room?

A. No, sir.
Q. Has it in the east?
A. Yes, sir.
174 Q. What?
A. Window.
Q. Door also?
A. No sir.
Q. How do you get in do you have to go into the side room?
A. There is a door in the west end of the side room, and a door in the north end of the main room.
Q. The door is in the west end of the side room?
A. Yes sir.
Q. No door in the west end of the main room?
A. No sir.
Q. And a door in the north end of the main room?
A. Yes sir.
—. ——.
A. No sir.
Q. Just simply a door?
A. Yes sir just simply a door.
Q. Now there was a door in the west end of the small room and you entered that from the yard?
A. Yes sir.
Q. And then there is a door going from the small room to the large room?
A. Yes sir. In the south side of the large room.
Q. How far from the west end of the building?
A. Something near two feet.
Q. Does the door open into the small room or large room?
A. Into the large room.
Q. Is it hung on the east or west facing?
A. On the east.
Q. Then opens west from west to east?
A. Yes sir.
175 Q. You spoke of a bed in that big room, what part of that room was it in?
A. The bed we taken off. It was in the southeast corner.

Re-direct examination by T. A. EDWARDS, county attorney:

Q. Who formerly owned that house of yours?
A. New.
Q. You bought it from him?
A. Yes sir.

Witness excused.

Mrs. G. B. TROTTER called and sworn as a witness on the part of the prosecution, testifies as follows:

Q. You are the wife of G. B. Trotter?
A. Yes sir.
Q. Where do you live?
A. Down near Combs.
Q. Was you living out there on the 13th day of last April?
A. Yes sir.
Q. Do you know the defendant?
A. Yes sir.
Q. Did you know the deceased, H. F. Doyle?
A. Yes sir.
Q. How close did you live to those parties?
A. I do not know how far it was.
Q. You were near neighbors?
A. Yes sir.
Q. Did you se- these parties on or about the 13th day of last April?
A. Yes sir.
Q. Where were you at They were down there in the neighborhood there?
A. Yes sir.
Q. Of your house?
176 A. Yes sir at my house.
Q. Now tell the jury all you saw at that time between those parties in you- own way.
A. I had started into the dugout on Saturday evening of April 13th, and I heard some shooting commence, and I got one half way down and I turned and come back, and went to the south of the dugout and looked, and I saw no one and I started to the door again, and just as I got to the door I got there some horses came running by, I run to the east corner of the house and saw the horses fall, and I run to the west of the house and Doyle hollowed. He said, For God's sake don't let him kill me. I said I will do all in my power to keep him from it, or something to that effect. He said, I want to get into the house. I turned and looked and did not see any one and I looked at Doyle and saw the blood running out from his shoe, over his shoe. I went and opened the door for him and he went in. And just as he went in he said, Do not let him come in. I said I will do all— I shut the door and went back to the outside door again, and I saw New coming and I run to him, and got hold of him and asked him not to go in, and he pulled me on to the side room door.
Q. Tell what was said. What you said and what he said.
A. I just asked him not to come in.
Q. Tell what you said.
A. I will when I get to it. He pulled me on and I was still holding to him. He stepped up into the side room door and I stepped

up. And I still had hold of him. He was standing there and I said, For God's sake don't kill him in my house. And I repeated it. He said If you will turn me loose I won't and he took hold of the door knob and went in. And Trotter pulled me out of the door and we went out west of the dugout.

Q. Did you hear anything after you went out?

177 A. Nothing at all only a gun fire. After he went in is all I heard.

Q. What did you next see?

A. The next that I recollect of se-ing was New when he came out in the yard.

Q. What did he do?

A. He walked around there a little while and I think if I recollect right he went down to the stable where our hay, where the hay was piled up, and got a horse and rode around in the yard, a little while or rather went to the gate if I recollect right he was sitting down there on the horse when Mrs. Doyle came down.

Q. Where did you next see him?

A. I never did see him again. I never did see him any more after he left until I saw him in here this morning. After he left to go I never saw him any more. After he left the gate.

Q. He was not around in the country there then was he at his home or near his home?

A. I do not know where he was.

Q. You never saw him any more?

A. Not after he left the gate that I recollect of.

Q. When after New came out did you go in?

A. Never did until Mrs. Doyle did. She went in first. Then Gracie. Then Mr. Trotter and then I.

Q. What did you find?

A. Found Mr. Doyle behind the door.

Q. Did you notice any wounds on his head?

A. Yes sir a hole here about his face somewhere in his cheek.

Q. Did you notice any other wounds?

A. No sir.

Q. Not any more at all.

A. Not at that time I did not. When I first went in.

Q. You met him you stated as he first went in?

178 A. Yes sir.

Q. Was that hole in his head when he first went in the house?

A. No sir I do not reckon it was. I did not notice it. I just noticed the blood on his shoe is all. Until after it was all over and the hole was found.

Q. Did you remain there in the house all the time?

A. I do not know as I did. Stay right there. I stayed around about there. Was not in the house all the time. I was in the dugout part of the time.

Q. In what direction and how far from your house to where these horses fell?
A. Northeast.
Q. On down the road.
A. Yes sir.
Q. Towards Doyle's?
A. Yes sir.
Q. How far from the house?
A. I do not know.
Q. Do you know about how far?
A. No sir.
Q. Whose team was it.
A. Mr. Doyle's.
Q. Those horses that you saw running, how many were there?
A. I do not know—oh there were four. Two with the gears on and two hitched to the wagon.
Q. One wagon?
A. Yes sir.
Q. And two loose horses with the gears on?
A. Yes sir.
Q. That horse that fell, was it loose or one on the wagon.?
A. One that was hitched onto the wagon.

Cross-examination by H. M. FURMAN, counsel for the defendant:

Q. Do you know whether Mr. Doyle had any arms on him?
179 A. I did not see any.
Q. Did you make any examination for any?
A. No sir.
Q. Was there any one else searching for arms?
A. No sir.

Witness excused.

Dr. MCCLAIN, called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name.
A. James McClane.
Q. What is your profession?
A. Physician.
Q. Where do you live?
A. At Combs.
Q. You were living out there last April?
A. Yes sir.
Q. Do you know the defendant?
A. Yes sir.

Q. Did you know the deceased?
A. Yes sir.
Q. Did you see either one of these parties on or about the 13th day of last April?
A. I do not remember whether it was the 13th or what day it was, when I was called, that is the date that I saw him. That evening.
Q. You saw the deceased?
A. Yes sir.
Q. In what condition?
A. Dead.
Q. Did you make an examination of him?
A. Not particular no, I examined him some.
180 Q. Tell the jury in what condition the body was.
A. When I saw the body it was lying on a mattress. Lying in about this direction, southwest with his head to the wall. There and he was lying on a mattress and dead.
Q. He was dead?
A. Yes sir he was dead and they had laid him out there.
Q. Did you notice any wounds?
A. Yes sir.
Q. Tell the jury about them.
A. A bullet went in at the left cheek about there, (indicating) and came out on the side of the neck about there. (Indicating.) And went down in the top of the shoulder, and I got the ball out about here, (indicating).
Q. Have you the ball?
A. Yes sir.
Q. Produce it.
A. (Hands the attorney ball.)
Q. That is the ball you got out of him?
A. Yes sir.

We introduce the ball in evidence. There is no objection. It is admitted in evidence and exhibited to the jury.

Q. What other wounds?
A. One wound in the upper and back part of the thigh, entered the back side and came out at the front side. Right about there. (Indicating).
Q. Did you notice any other wounds?
A. Yes sir.
Q. What?
A. The skull was crushed in at the center—at the left side and center of the head. It was crushed open there. Just crushed open there. It looked like it had been struck with a gun barrel or something of the kind.
181 Q. What in your opinion caused the death of Mr. Doyle?
A. I cannot tell you. Whether it was caused from one of the gun shot wounds or the stroke on the head. I cannot tell that.
Q. You cannot tell which of the wounds caused his death?

A. No sir.
Q. Is it your opinion that one of these wounds caused his death?
A. Yes sir.

Witness excused.

Mr. W. A. REEVES, called and sworn as a witness for the prosecution testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. Walter A. Reeves.
Q. Where do you live?
A. I live out near Combs.
Q. How long—you was living out there last April?
A. Yes sir.
Q. Did you know the defendant?
A. Yes sir.
Q. Did you know the deceased?
A. Yes sir.
Q. You may state what relationship if any exists between you and these parties?
A. H. F. Doyle married my oldest sister, and John T. New married my second sister.
Q. Did you see these parties on or about the 13th day of April last?
A. Yes sir.
Q. Where were they?
A. H. F. Doyle was in his wagon and John T. New was in his pasture, or close to his fence.
Q. Now go ahead and state what took place at that time.
182 A. Well when I first saw the defendant, John T. New, he was something like one hundred and twenty-five yards from me. I made this remark to the deceased, Doyle, I said Yonder is John New now, I suppose working on his fence. And I thought he was. I do not know but what I was right about it. Well as we drove on further I remarked, I made this remark, I said As like as not my horses will go in there, and I will have to go in for them, and I said this to Doyle the deceased. I said New may get offended at my coming in I said I do not reckon he will. And we got on I think to the best of my knowledge, I cannot be positive, we must have been seventy-five yards from New, when I spoke this. I told him, I said I do not reckon he will get offended. And about that time I saw him, the defendant look up towards us. I reckon he was I thought so. I did not know. He looked towards us. We drove on and I saw him look the second time. And we drove on and was not expecting any trouble so far as I knew, so far as myself, well as I knew those two men were liable to from what I had heard and seen. And we

drove on until we got in about sixty or seventy yards I guess. New started up the fence going west. We was in the lane going east. He raised up his head. He was getting up. I made this remark. I said, Henry I am afraid you are going to have trouble this evening. He made no reply to anything I said, after I said I thought I saw him working on his fence. And he, New, came on up the fence and when he got something like ten or twelve steps I saw him reach down with his left hand and pick up his gun and yet I did not expect any trouble and he threw it to his shoulder and fired. About as quick as he could. It stunned me. Doyle jumped out of the wagon. And I saw New throw the hull out, and I jumped, I jumped out on the same side Doyle did, on the south side, with my face to the east, and he fired and I just felt it between me and Doyle.

183 Q. Then what was next done?

A. I run west and took a lane south. I saw New shooting at Doyle as long as I could tell in that direction. The team Doyle had, he had a line in each hand, they were surging and pulling a little to the right, towards the south side of the lane, and they finally jerked the lines out of his hand, and when they done that I seen dust fly up around Doyle once or twice at the crack of the gun, and then went on several yards, I was going south and they was going east, I was going due south and these two men were going due east, I saw New lay his gun on the wire close to a post, or on a knot on a post, or possibly on the wire, and I saw him take deliberate aim, pointing towards Doyle, I seen Doyle go down in his right leg and throw his hand down like this, (indicating), I heard no words said by either party while I was present. I seen one or two more shots, Doyle went on down the lane going east, and New was in his pasture going down the string of the fence, on the inside. And Doyle went out of my sight going towards Trotter's house. New done the same. I saw somebody step in front of the man that went in last. I was going south and they east. I was going one way and they going the other. I stood up there. I did not know what to make of it I was excited. I did not know whether he wanted to kill me or not. I was not expecting any trouble so far as I was concerned. Though I was between the other two parties. I stopped up there and rested a while. I was running for the house. I would—I was tired and would stop and rest. I would run as far as I could, I stopped and rested, and heard a shot I did not know where. I saw a man come out of the house. And I saw a man west of Trotter's residence, a little west of his orchard. I was excited and afraid of trouble again, I thought the way the play was made it was for both of us. I may have been mistaken I saw this man on the horse down there and when I turned west he turned west, and when I turned east the man on the horse turned east, I first

184 thought of going to my sister's and then I saw that I could not get there and then I went to King's. I went over Mr. Trotter's fence.

By the COUNSEL FOR THE DEFENDANT: We object to that.
Overruled. Exception.

There was an off set, his fence goes south, and King's fence comes further west than Trotter's, and I went through there in that jog. I saw the gentleman on the horse go west, and when I got one half way between this jog, the jog runs on King's land further than on Trotter's, I got through this and got southeast down to Trotter's house, down to King's house I should say, when I got some place about two thirds the distance I just simply was run down, and I stopped into a walk, and I looked and I saw that it was John New on the horse, bare backed. He never made any pretension to hurt me he was running. I was running from fear. I was following the only course I knew. I went to King's and told him.

Do not tell that.

A. Well I went on into Mr. King's house.

Q. Mr. Reeves, look at this platt and locate these places. After you went into King's house did you see the horse go south the man on horse back?

A. Yes sir he went out of my sight going south.

Q. And you saw him go back?

A. Yes sir the same man and the horse. I had been running and it was too far to be positive. It was I thought the same man it looked to be.

Q. About how fast was he traveling?

A. He looked like he was doing about all he could do.

Q. Now look at this platt, Exhibit A. This will be the platt of the land. This is the section line. Now this is supposed to be Reeves' eighty (indicating the platt).

185 A. This is my mother's place if I understand it. And this is the side on the section line, down south. There is where we were when I saw New working on the fence. He was striking I do not know what he had in his hand. I supposed he was working on the fence.

Q. You was along here by the gate?

A. Yes sir. Some where — this gate, about opposite this gate. And he was down the fence further east.

Q. Within ten or twelve steps and he came meeting you?

A. Yes sir.

Q. And this shooting began about opposite the gate?

A. Yes sir. Somewhere about there.

Q. You jumped out and turned this way. (Indicating.)

A. Yes sir. Turned west and then down this lane.

Q. Where is King's house down this way?

A. King owns the house and land south of Trotter.

Q. South of Trotter?

A. Yes sir. Yes sir.

Q. You had just gone on across and came down this line? (Indicating.)

A. Yes sir.

Q. And then got back to this line?

A. Yes sir.

Q. And you say that Doyle got down this road here, (indicating), down to Trotter's house?

A. Yes sir.

Q. And New down on the inside of the fence in that direction?

A. I did.

Q. You could see them?

A. Yes sir.

Q. Now how many horses did you and Doyle have?

A. I was working two and he two.

186 Q. How many wagons?

A. Two.

Q. Have two there?

A. No sir. I left the wagon that I had at Mr. Jim Lightfoot's.

Q. That was here?

A. Yes sir I do not know their given names well, it was the west one, we call them Upper Lightfoot and Lower Lightfoot.

Q. What did you do with the horses when you left the wagon?

A. Done the lines up and put the traces up and put them in the road in front.

Q. Who was driving?

A. Doyle was.

Q. How was you sitting?

A. In chairs, two chairs.

Q. How far was New from you when you first saw him?

A. I do not know, as near as I can tell, 100 yards or better.

Q. He was coming up the fence towards you?

A. Not when I first saw him.

Q. How long after?

A. Probably a minute or so.

Q. You was coming down the road east in the direction from which he was coming?

A. We was going east, I saw him apparently driving with his right hand, that is what I said, Yonder is John New now, working on his fence.

Q. Was there anything said by any one when you came up?

A. No sir. I never heard a word spoken by Doyle or New.

Q. What was the first thing done between the parties?

A. John reached down and picked up a Winchester sitting on the north side of the post, and throwed it to the right shoulder and fired.

187 Q. Did you hear the ball?

A. Yes sir and felt it.

Q. Where did it pass?

A. Right in front of my mouth.

Q. How much did it miss Doyle?

A. I think a foot to the best of my knowledge.

Q. You both jumped out?

A. Doyle jumped out first. And when he jumped out I saw New throw the thing back, the lever and something fell, I took that to be a shell, and I knew there was going to be some more shooting and I jumped out, and then I saw some more smoke.

Q. You went west to the lane and then south?

A. Yes sir.

Q. You meant the shell when you said the hull a little while ago?

A. Yes sir.

Q. What else did you see hit?

A. Yes sir I saw it light, saw where it hit.

Q. He was holding the team, Doyle was?

A. Yes sir. Had a line in each hand, and was out on the ground, holding them before ever I jumped. Had a line in each hand.

Q. Do you know or did you notice how Doyle was driving as he came up?

A. Yes sir.

Q. How? Had a line in each hand?

A. Yes sir.

Q. Sitting in his chair?

A. Yes sir.

Q. Did he continue to hold them that way?

A. Yes sir. When he jumped out he had a line in each hand. They were high spirited horses and he was trying to hold them.

Q. He was trying to hold them?

188 A. Yes sir he was pulling back and holding them as best he could.

Q. He was on the south side of the wagon?

A. Yes sir.

Q. And had a line in each hand?

A. Yes sir.

Q. Which side was he sitting on when driving?

A. Near the center of the wagon.

Q. How was you sitting?

A. My chair was on the south and I was sitting just this way. (Indicating.)

Q. Now where was you sitting?

A. Like this, (indicating), I was leaning against the wagon there as unconcerned as I am now, and Doyle was sitting here, (indicating), and never answered, never answered a word, never said a word.

Q. Now he was sitting here and which direction was New.

A. Off in this direction, (pointing), northeast, ten or twelve steps to the best of my knowledge.

Q. You and Doyle jumped out on the same side of the wagon?

A. Yes sir.

A. Yes sir.

Q. On the south side?

A. Yes sir.

Q. Away from New?
A. Yes sir.
Q. You saw another ball hit the dust about the time you jumped?
A. I think so.
Q. You heard the shot?
A. Yes sir.
Q. How many shots were fired in all?
A. I think some where to the best of my knowledge, between six and eight, six to the best of my knowledge.
Q. Do you know anything, did you see this wagon and team again after that?
189 A. Yes sir.
A. East of Trotter's on the north side of the lane, about one hundred yards.
Q. Between Trotter's and Doyle's house?
A. Yes sir.
Q. What was its condition?
A. The horse on the north side was dead. He had sprung into the fence and fell over and was laying dead.
Q. That was the horse on the side of the wagon next to New?
A. Yes sir.
Q. Did you see any marks on the horses?
A. Yes sir.
Q. How many?
A. Two. He was shot in front of the left hip, and upon the left shoulder. The shot in front of the left hip had went clear through, and upon the left shoulder a shot but it did not seem to go through.
Q. Now this shot that went through the horse, he was shot in front of the left hip?
A. Yes sir.
Q. Where did it come out?
A. Some where between the hip on the right side and the rib.
Q. Which shot was the closest to the hip?
Q. Where it came out or where it went in?
A. Where it came out.
Q. Can you tell how much?
A. About six to ten inches, I cannot tell positively. I do not think, I saw that it went through him.
Q. You said that you saw New lay his gun on a post or near a post?
A. I did not state that. It was near a post on the wire or against the post. It was up against a post to the best of my knowl-
190 edge. I was too far away to be positive, to an inch or one half inch but it looked that way. And he took deliberate aim and at the crack of the gun I saw Doyle give way, and clap his hands down this way. (Indicating.)
Q. What was Doyle doing before that shot?
A. Running on east.
Q. Toward or from New?

A. Running from him.

Q. In the direction of whose house?

A. In the direction of his own house and Trotter's. Going east and both houses was in front of him.

Q. How far in all did he run from New?

A. It must have been something like three hundred and fifty yards, something like that.

Q. How far to the best you can tell had he run at the time he was shot through the leg?

A. To the best of my knowledge something like one hundred and twenty five yards. From where the shooting started. That I have got to guess at I could not tell exactly.

191 Q. Now you know that land there to the north of that road well?

A. Yes sir.

Q. Do you know anything about a dug out or an old dug out or something near there?

A. Yes sir.

Q. Tell about its location?

A. It is someting like sixty or fifty yards from where the shooting began. And twelve or fifteen steps north of this line. The string of fence running east and west.

Q. About fifteen yards north of the road.

A. Yes, sir, something like that.

Q. How far east of the gate?

A. Something like sixty yards.

Q. How far was this dug out—describe that dug out? What kind of a place is it?

A. Well gentlemen it is an old dug out I reckon. That is what I judged it to be, it is something like three feet deep, and about ten by twelve, I believe that is all. As near as I can tell. Something like ten by twelve. And something like fifteen feet, twelve or fifteen feet from this fence, north.

Q. Feet or yards?

A. Yards, yards I mean and about ten or twelve feet square.

Q. No roof on it?

A. No sir.

Q. Simply a hole about that big and three feet deep?

A. Yes sir.

Q. How far is that from where you first say New?

A. Fifteen or twenty steps, he was fifteen or twenty steps west of it, standing up near a post.

Cross examination by Mr. FURMAN:

By the COUNSEL FOR THE TERRITORY: Wait just a moment I want to ask him another question or two.

192 Q. This was in Washita county?

A. Yes sir.

Q. What Territory.
A. Oklahoma Territory.
Q. What time?
A. It was the 13th day of April, somewhere about the time, somewhere about an hour and one half by sun, to the best of my remembrance.
Q. What year?
A. 1901.

Cross examination by H. M. FURMAN, counsel for defendant:

Q. You and Doyle was coming from Granite?
A. Yes sir.
Q. How far was it from Granite to the place of this trouble?
A. Something like twenty or twenty-two miles somewhere about that.
Q. What time in the day did you leave Granite?
A. It was somewhere between eight and ten o'clock.
Q. In the morning?
A. Yes sir. We eat dinner at North Fork three or four miles this side of Granite.
Q. You was one hundred and fifty yards from New before you recognized him?
A. I do not know, maybe one hundred and fifty or two hundred.
Q. How near was you to him when he first looked up and saw you?
A. To the best of my knowledge something like seventy-five or one hundred yards.
Q. You had traveled something like seventy-five or one hundred yards after you knew New before he saw you?
A. I cannot tell, sure about that. I think fifty-five or sixty yards.
Q. He first looked up, and looked in the direction you were coming, and then looked down and went on with his work?
A. Yes sir he struck, he seemed to be working.
Q. How far had you gone before he looked up and started for his gun?
193 A. I would have to guess at that, it must have been, it may have been seventy-five yards or one hundred yards I cannot tell.
Q. You kept on drawing closer to him?
A. Yes, sir. He came on west coming towards us on the inside.
Q. Now you say that when he shot Doyle jumped out?
A. Yes sir.
Q. And had the reins in both hands?
A. Yes sir.
Q. Do you know W. J. Burroughs who lives at Salyer, in the State of Texas?
A. Yes sir.

Q. Did you see him in Salyer, Texas, on Friday after the killing?
A. I saw him there after Doyle was buried.
Q. Did you not tell him in Salyer that you and Doyle was coming along the road, and saw New, and you said Yonder is that fellow now, you had better look out, and then Doyle began to get his pistol loose, it was pinned in his inside vest pocket, and New went down and got his gun and began to shoot, and you jumped out and run like hell, and Doyle kept trying to get his gun, and hold his team.
Q. Did you tell that?
A. No sir.
Q. Nor nothing like that?
A. No sir.
Q. As a matter of fact is that about the way the trouble started?
A. No sir.
Q. You run?
A. Yes sir.
Q. Did you run fast?
A. I do not know how fast.
Q. And kept it up?
A. Yes sir.
Q. You say that you did not think at first that New was after you, just thought he was after Doyle? Is that all?
A. No sir, I never thought of any trouble at all when I first saw him. And so far as myself was concerned I never dreampted
194 of such a thing.
Q. You never had any trouble with him?
A. No sir—well yes sir we had had some trouble and we had talked it over, and we talked it over and agreed to disagree and have nothing to do with each other.
Q. You never had been carrying a gun for him?
A. No sir.
Q. Do you know W. F. Harper?
A. Yes sir.
Q. He lives at Childress, Texas?
A. I do not know his home.
Q. Do you remember the morning that Doyle was taken to Texas to be buried?
A. Yes sir.
Q. Did you not see Mr. Harper that morning at Doyle's?
A. I did.
Q. Did you not say this to him: "We were all carrying guns for each other but I did not think it would amount to anything, but would just be a bluff?
A. I did not say it.
Q. I will ask you if you did not go to Mr. Trotter's house and in the presence of Charlie Trotter, and the old gentleman, and your brother Solon was with you, if you did not go to Trotter's house and ask him if he ever heard New say anything about you, or about you and Solon, and he said no, and you spoke up and said he had

been talking about you, and you had a good notion to go to his house and call him out and give him a beating?

A. I said that, I did not say anything about beating him.

Q. You are certain of that?

A. Yes sir.

Q. You are certain, you are as certain of that as you are of anything you have testified to?

195 A. Yes sir.

Q. How long before the shooting that this conversation took place?

A. Eight or nine months.

Q. You remember the purport of the conversation and of being there together?

A. Yes sir.

Q. But you did not say that you had a notion to call him out and give him a beating?

A. No sir. I have no recollection of it at all.

Q. Trotter advised you not to go did he not?

A. I do not know about that.

Q. Do you know R. E. Tillford?

A. Yes sir.

Q. On the Monday morning before the killing was you in Port?

A. I never was there.

Q. Was you in West Wood?

A. I remember of being there I do not remember of meeting him.

Q. Did you not tell him in Port that you was going down to Combs, to stay until the small pox scare was over, at your place?

A. I do not remember it.

Q. Did you not tell him that you was going to raise a little hell and he asked you what, and you said You will hear of it, and you said I am going to run John New off and he said John may not run, and you said I do not care a damn, I will run him off or kill him?

A. No sir. I never said that.

Q. You contend there was no animosity between you?

A. No sir. I do not.

Q. There was?

A. Yes sir there was. But we had agreed to let the thing go and have nothing to do with each other.

Q. How many times did he look up?

A. I think twice.

Q. Before he started for his gun?

A. I think so.

196 Q. And you say that after you jumped out you ran as fast as you could?

A. Yes sir just a few steps west and then south. As I was running I looked back, they was going east and I south. Of course I heard the shooting and looked back.

Q. You was running one way and looking the other?

A. I was looking over my left shoulder.

Q. You was looking one way and running another?
A. I was looking over my shoulder.
Q. Was not these parties to your back?
A. No sir.
Q. But is it not the fact that the faster you run and the farther you got the nearer to your back they would be?
A. Yes sir—I suppose so. They was going east and I was going south. We was going off in right angles from each other. I was going south and they east. I was going south and they east. I was the only fellow going south.
Q. Do you know if Doyle was armed, had a pistol?
A. I do not know I think so. I did not see him have any.
Q. Did you see him have a pistol?
A. I did not.
Q. Did you have a pistol?
A. I did not.
Q. Did you not throw your pistol away when running like hell?
A. No sir I did not.
Q. The pistol would not work and you threw it away and took to your heels and run like hell?
A. No sir. *A.* No sir I never carried one in my life.
Q. Is it not a fact that you had, you and Doyle had been waiting for a chance to get New out and kill him?
A. No sir. I did not have any such an idea. I do not know whether Doyle did or not.

197 Redirect examination by T. A. EDWARDS, county attorney:

Q. When did you go to Granite, you and Doyle?
A. Went down Friday morning.
Q. And was coming back Saturday?
A. Yes sir.

Witness excused.

Mr. KING, a witness called and sworn on the part of the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. Where do you reside?
A. Out there near Combs.
Q. Where in reference to Mr. Trotter's place?
A. A mile south.
Q. On the quarter section south of him?
A. Yes sir.
Q. You was living there last April?
A. Yes sir.
Q. Do you know the defendant?
A. Yes sir.

Q. Did you know H. F. Doyle?
A. Yes sir.
Q. Did you know W. A. Reeves?
A. Yes sir.
Q. State if you saw Reeves on or about the 13th day of last April?
A. Yes sir.
Q. Where was he?
A. He came to my house.
Q. In what condition?

Objected to. Overruled. Exception. Let him answer.

A. He just came into the house.
Q. Did he have the appearance of having been running?

Objected to as leading. Overruled. Exception.

A. Yes sir.
Q. Did you see anything else after he came in?
198 A. Yes sir.
Q. Tell about it.
A. After Dick came in I saw a man coming up the lane.
Q. From which direction did he come in?
A. I do not know he was in the house before I saw him.
Q. Well you say that you saw some one?
A. Yes sir.
Q. Where?
A. In the lane west of the house.
Q. Now this is the lane is this the lane that leads down west of Trotter's place?
A. Yes sir.
Q. Goes south?
A. Yes sir.
Q. And leads out of the road that runs from Combs, east?
A. Yes sir. This lane I am speaking of leads out of the other lane.
A. By the counsel, Yes sir.
Q. How was he traveling?
A. Horse back.
Q. What direction?
A. North.
Q. How?
A. In a walk but got into a gallop before he got out of my sight.

Witness excused.

Mr. WALLACE KING called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS:

Q. State your name?
A. Wallace King.
Q. Where do you live?
A. A mile and one half east of Combs.
Q. Where in reference to Trotter's.
A. South.
Q. On the quarter south?
199 A. Yes sir.
Q. You was living there in April last?
A. Yes sir.
Q. You know the defendant?
—. ——.
Q. And Doyle?
A. Yes sir.
Q. And Reeves?
A. Yes sir.
Q. Did you see him on the 13th day of last April? You remember the circumstance of the killing?
A. Yes sir.
Q. Did you see him on or about that day?
A. I did not see him until he came to the house.
Q. Did you see him?
A. Yes sir.
Q. Where did you see him?
A. In the house.
Q. Did you see any one else?
A. No sir.
Q. Did you see any person else about that time?
A. No sir. We went on together in the house.
Q. In the road did you see any one?
A. No sir.
Q. Out west of the house in the road, see any one riding a horse back?
A. No sir.
Q. Did you see any one at all that evening riding west?
A. I saw a man come into the lane before Dick came into the house.
Q. From what direction?
A. North.
Q. How was he traveling?
A. In a slow lope.
Q. You saw him come into the lane?
200 A. Yes sir.
Q. Did you see him again?
A. Yes sir. Saw him going back.

Q. What gait was he traveling?
A. He was going in a trot when I saw him going back.
Q. How long was it between the time that you saw him come into the lane and saw him going back?
A. It could not have been over a couple of minutes I guess.

Take the witness.

Cross-examination by Mr. H. M. FURMAN:

Q. Did he start back before Dick came in the house?
A. I did not see him start back. I saw him going back.

Witness excused.

Mr. JIM BLOCKER, called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. Blocker, J. B.
Q. Where do you live?
A. I live about twenty-seven miles southwest of here.
Q. Where do you live in reference to Mr. Trotter's place, C. B Trotter?
A. I live one mile south of the south line of his place. *A.* I live one mile and one half south of the south line of his place.
Q. From the north line of his place?
A. Yes sir.
Q. Do you know John New?
A. Yes sir.
Q. Do you know—was you at home on the evening of the 13th day of last April?
A. Yes sir.
Q. At the time that this killing took place out in that country?
A. Yes sir.
Q. Do you know about the line that runs south running on the west side of Trotter's and King's place?
201 A. Yes sir.
Q. Now state the condition of that road, in the line down near the south end of it, towards your place? Was there a branch across the road down there? At the east end of the section line at the corner? What is the condition of it as to being traveled?
A. Well I know there is no travel on it. The road has always went—in going down the lane they would turn in there, the travel has always been going into Mr. King's place and then into Witten's, there has been no wagon crossing and a man could possibly cross on horse back.

Q. No one comes down that way in going to your house as a rule?
A. No sir.
Q. Did you see any one travelling that road that evening? South of Mr. King's on the west side of his place?
A. I saw a man on the road in the lane on the west side.
Q. Tell about it?
A. I saw a man coming down there.
Q. Which direction?
A. South.
Q. What gait was he going?
A. He was going in a fast trot or a slow lope.
Q. Did you see him again after seeing him going south?
A. Yes sir.
Q. Going in what direction?
A. North.
Q. Going north?
A. Yes sir.
Q. About how much time was there between the time that you saw him going south and north?
A. Just about time enough for a man to travel at a brisk trot or a slow lope, four hundred yards. Or a quarter of a mile. I looked up and saw him and thought it was some one coming to my place, and I looked up to see about when he was coming across, and see if he was coming into my gate. I looked up and saw him going back.
202 Q. What speed?
A. Going in a lope.

Witness excused.

Mr. JAMES WALKER, a witness for the prosecution, called and sworn, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. J. L. Walker.
Q. Where do you live?
A. I live two miles east of Combs.
Q. Do you know John New?
A. I do.
Q. Did you know H. F. Doyle, the deceased?
A. I did.
Q. How far did you live from their places?
A. Hardly one half mile east of Doyle.
Q. Right on down the road east?
A. Yes sir a little over one half mile I mean. The place that he lives or did live on joins mine.
Q. Was you there on the 13th day of last April?
A. I was.

Q. I will ask you if you traveled on that road from your place to Combs?

A. I did from my place to Combs.

Q. And back home?

A. I did I came back home that night. I left home intending to stay away from home all night.

Q. What time did you pass?

A. About an hour and one half by sun. Possibly two hours.

Q. Coming from your place to Combs?

A. Coming from my place west.

Q. Did you hear any shooting?

A. Yes sir.

Q. Where were you?

203 A. I was one half mile east of Combs.

Q. How far were you—do you know where the shooting took place?

A. I know where they said, I did not see it.

Q. Do you know where the gate is on the north side of the section line that leads into the field that goes to New's house?

A. I do.

Q. You know that very well?

A. Yes, sir.

Q. How far was you from that when the shooting took place?

A. One half mile.

Q. West?

A. Yes sir.

Q. How traveling?

A. Horse back.

Q. Did you see any of the parties, that is Reeves or Doyle the evening?

A. Yes sir.

Q. Where were they when you first saw them?

A. Just near Mr. Jim Lightfoot's. You can say by the road a little. And as I got up there Doyle drove the wagon out of the road. He was waiting for Reeves to turn his horses loose I spoke to Doyle and talked a minute. They came on towards home and I went on west.

Q. At what rate of speed was you going?

A. In a walk.

Q. At what rate of speed was you riding when you passed that gate?

A. Riding along in a walk.

Q. Who did you see?

A. Tommy New.

Q. Where was he?

A. Down about Trotter's house. That was the only person I saw along the road.

Q. On the north side, you rode on past this gate and was one half a mile west from it when the shooting commenced?

A. Yes sir.

204 Cross examination by Mr. FURMAN:

Q. You did not see anybody on the south side of the road there?
A. No sir.
Q. Did not see anybody except little Tommy New?
A. No sir. No one at all.

Witness excused.

Mr. JAMES LIGHTFOOT called and sworn as a witness for the prosecution testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. J. A. Lightfoot.
Q. Where do you live?
A. About twenty-four miles southwest.
Q. Where do you live in reference to Mr. New's place?
A. About one half mile southwest of him.
Q. You corner with him?
A. No sir.
Q. The quarter in which your house is does?
A. No sir.
Q. You live on the Combs road?
A. Yes sir.
Q. How far east of Combs?
A. One half a mile.
Q. You know the deceased and the defendant?
A. Yes sir.
Q. And W. A. Reeves—Dick?
A. Yes sir.
Q. Were you at home on the 13th day of last April?
A. Yes sir.
Q. You know the circumstance of the killing of Doyle?
A. Yes sir I heard of it.
Q. Did you see the deceased that evening?
A. I saw him place—I saw him pass my place, the window at my place. I was not out.
205 Q. Who was with him?
A. There was not any one with him when he passed where I could see him.
Q. He passed your house going what direction?
A. East.
Q. Did you hear any shooting?
A. Yes sir.
Q. Where were you?
A. At home in the house.

Q. Did you leave home?
A. Yes sir.
Q. Where did you go?
A. I went east down the road to where just west of Trotter's. I went to Trotter's.
Q. Did you see John New?
A. Yes sir.
Q. Where?
A. About two hundred yards west of Mr. Trotter's house.
Q. What passed between you?
A. I just met him in the road and spoke to him. I told him howdy and I asked him what had occurred, what was the matter, and he just told me that he was out there at work on the fence between my brother and New, the fence was down there had been one wire off for a week or two, and the cattle going through and he said he had been there working on the fence and Doyle and Reeves was coming down the road, he said and just before they got to him they reached after their gun—Go ahead—and he said he knew there had to be something done, or was going to be something done, I could not state for certain, and that when they reached after their gun he stepped up to where his gun was, and picked it up and when they got down pretty close to him he just turned loose, and he told the whole occurrence.
Q. Is that all?
A. No sir. Not exactly, he said that Doyle went on down to the house that he killed him down to Mr. Trotter's house, that was the substance of it.
206 Q. Anything else?
A. I said I am awful sorry; he said Yes I am not sorry I done the work but I am sorry that I had it to do.
Q. Did he say anything about killing any dogs?
A. No sir.
Q. How was he traveling?
A. Horse back.
Q. Any saddle?
A. No sir.
Q. Any harness?
A. I think so.
Q. Did he have anything?
A. He had a Winchester, I suppose he had a gun.
Q. How long after the shooting?
A. A quarter of an hour maybe.
Q. In what direction was he traveling?
A. Going west.

Witness excused.

Mr. W. R. CAMPBELL called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS, county attorney:

Q. State your name?
A. W. R. Campbell.
Q. Where do you live?
A. In Combs.
Q. Do you know the defendant?
A. Yes sir. I have a short acquaintance.
Q. Did you know the deceased?
A. Yes sir.
Q. How far did you live from these parties?
A. I cannot tell the distance. Our places did join, the way I have built I could not tell exactly.
Q. Did you know of any, did you ever know of any trouble between the defendant New and the deceased Doyle?
207 A. Yes sir, a little.
Q. Did you ever talk with defendant New about that?
A. Yes sir we have talked a little about it.
Q. When did that occur, the conversation?
A. About the killing?
Q. I mean this trouble that you talked about.
A. It was before the killing, I cannot state the exact time, I do not remember.
Q. State the conversation you had about it?
A. I was at work and the subject came up I do not know how. But we got to talking and he got to telling me about going into Doyle's pasture, I do not know why he went there, but they got into dispute some way, and he said something about throwing a piece of metal at him.
Q. Who threw it?
A. New.
Q. Threw it at Doyle?
A. Yes sir. And then he beat him to his gun, I suppose that meant they both had guns, and he said he hunted around until he found what he throwed at him, and I think went along a piece or followed him a piece, and he said he turned down his pants, and turned backwards to him, and sat down to see if he had any resentment to him.
Q. New said he done that?
A. Yes sir.
Q. To see if Doyle had any resentment?
A. Yes sir.
Q. Did he say whether he had any?
A. He did not say anything I do not reckon he had any, he did not have as much as I would have had.

Witness excused.

208 Mr. J. W. MILLER called and sworn as a witness for the prosecution, testifies as follows:

Direct examination by T. A. EDWARDS:

Q. State your name?
A. J. W. Miller.
Q. What official position do you hold?
A. Sheriff of Washita county.
Q. You were sheriff last April?
A. Yes sir.
Q. Do you know John New
A. Yes sir.
Q. Did you know the deceased?
A. Yes sir.
Q. Did you know of the circumstance of the killing of Doyle in this county?
A. Yes sir I heard of it.
Q. I will ask you if you arrested the defendant.
A. Yes sir.
Q. Where did you arrest him?
A. In Greer county.
Q. When did you go out to that neighborhood after the killing?
A. The killing was on Saturday night and I went out Sunday morning after the killing.
Q. Did you at once begin search for the defendant?
A. Yes sir.
Q. How long did you continue it?
A. Until the next Saturday night.
Q. And you found the defendant in Greer county?
A. Yes sir.
Q. And you arrested him and brought him back?
A. Yes sir.

209 Cross examination by Mr. FURMAN:

Q. He was sick when you found him?
A. Yes sir.

Witness excused.

By the COUNTY ATTORNEY: The plat as identified and marked Exhibit A is offered in evidence.
No objection. It is admitted in evidence.
The plat follows:

(Here follows diagram marked p. 209.)

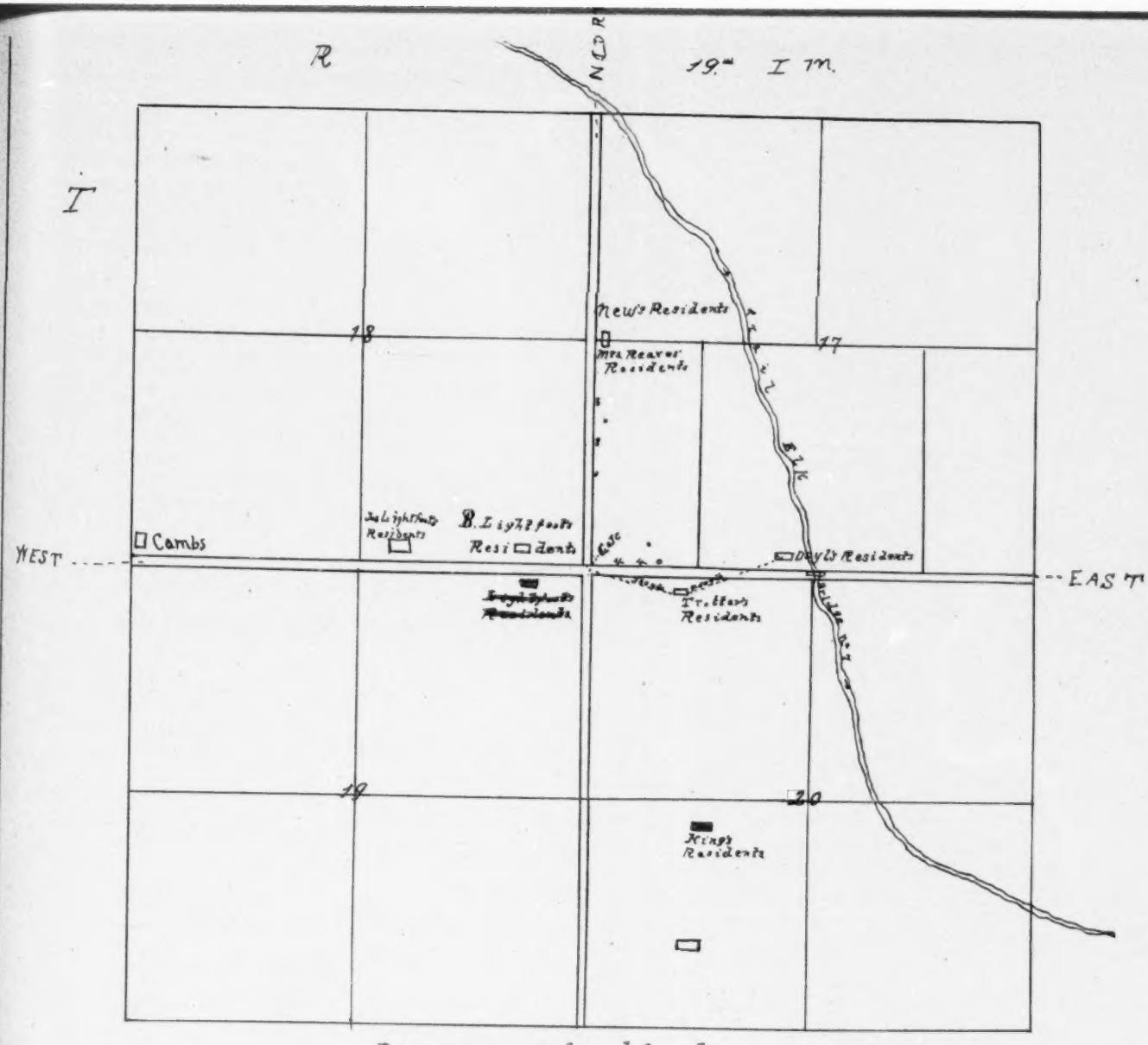


Diagram of locality where Mr. Doyle was shot.

No. 226. New Oklahoma } 209

Exhibit A
T.F. Millikan

180

By the COUNTY ATTORNEY: The Territory will rest.

211 Here the court readmonishes the jury.
Adjourn court to 1.30 Mr. Crier.

By the CRIER: Oh yes, oh yes, oh yes, the honorable district court in and for Washita county, Oklahoma Territory, is now adjourned until one thirty o'clock to-day.

After adjournment.

Open court Mr. Crier.

By the CRIER: Oh yes, oh yes, oh yes, the honorable district court within and for Washita county, Oklahoma Territory, is now in session.

By the COURT: You may proceed. Call the jury Mr. Clerk.

The clerk calls the jury. All answer present. The defendant present in open court by counsel and in person. The Territory present by its counsel.

By the COURT: Proceed gentlemen if you are ready.

By the COUNSEL FOR THE DEFENDANT: Call Mr. Hampton.

Mr. HAMPTON called and sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by H. M. FURMAN, counsel for defendant:

Q. State your name.
A. Thomas J. Hampton.
Q. Where do you reside?
A. Southwest part of the county.
Q. Near what post office?
A. Wood.
Q. How far do you live from Combs?
A. About four miles.
Q. Do you hold any official position?
A. Yes sir.
Q. What?
A. Justice of the peace.
Q. Did you hold that office in April of the present year?
A. Yes, sir.
Q. Did you conduct an inquest over the body of H. F. Doyle?
212 A. Yes sir.
Q. Did you make any examination of his body as to whether or not he had any arms on?
A. Yes sir.
Q. Did you find any?
A. I did.
Q. What?
A. A pistol.

Q. What became of it?
A. I have it in charge. It is in the sheriff's room.
Q. Please bring it up.
—. ——.
Q. Who had you summoned here?
A. The Territory.
Q. The prosecution?
A. Yes sir.

Here the witness produces a pistol.

Q. Where did you find that pistol?
A. In the vest pocket of the deceased.
Q. Inside or outside?
A. Inside. In the right side of the vest.
Q. Was it fastened?
A. Yes sir.
Q. How?
A. With a safety pin.
Q. Was the pin point of the pin unfastened, or in what condition?
A. The pin point was out of the safety chamber of the pin.
Q. Please take it out and let the jury see it.
Q. Is it loaded?
A. Yes sir.
Q. Has it been emptied?
A. No sir.

By the COURT: Take it out and let the sheriff empty it.
213 By the COUNSEL FOR THE DEFENDANT: Please take the pistol out of the pocket so the jury can see it.
A. I will have to take the pin out.
Q. Is it in the same shape that it was?
A. Yes sir.
Q. Now take it out.
—. ——.
Q. What is the caliber, and make?
A. I do not know.
Q. You delivered it to the sheriff?
A. Yes sir.
Q. When?
A. I came up Monday morning. Monday evening.
Q. Do you know it is the same pin or not?
A. Yes sir.
Q. Was the pin in that same condition at the time?
A. Yes sir.

By the COUNSEL FOR THE DEFENDANT: We offer the pin in evidence, we want the jury to examine it.

Q. What effort if any did it require to get the pistol out of the pocket?

A. It required some effort.
Q. How many efforts did you have to pull?
A. I think I made the second or third pull before I removed it. If I am not mistaken.
Q. What force did you pull with?
A. I do not know, not distinctly. Some considerable effort to draw it out. It seemed to be cankered and would not slip easily.
Q. What time did you go there?
A. I do not know. After dark and before midnight. It was not dark when I received the news as soon as I could get ready and go down I went.
Q. Who was present when you got the pistol off of the deceased?
A. I do not know. The house was always full. The jury
214 was present and looking on and the constable and Tatumm and others. Some strangers to me, various others.
Witness excused. No cross-examination.
Here the sheriff Mr. Miller is called as a witness for the defendant.
The attorney for the defendant states that he wants him to prove or indentify the pistol.
By the COUNSEL FOR THE TERRITORY: There is no question of the identity of the pistol.
By the COUNSEL FOR THE DEFENDANT: It is waived then.
By the COUNSEL FOR THE TERRITORY: A. Yes sir.
By COUNSEL FOR THE DEFENDANT: Tell the sheriff that we do not need him.

Mr. HARPER called as a witnsss for the defendant testifies as follows:

Direct examination by Mr. FURMAN:

Q. Are you acquainted with Dick Reeves?
A. Yes sir.
Q. Was you at Doyle's house the day he was carried to Texas to be buried?
A. Yes sir.
Q. Did you see Dick Reeves that day there?
A. Yes sir.
Q. Did he state there to you on that occasion that we were all carrying out guns for each other, but I did not think it would amount to anything, I thought it would be just a bluff?
A. Yes sir. He stated to me those facts.

Cross examination by T. A. EDWARDS:

Q. When was this?
A. The morning that Doyle was carried to Texas.
Q. How long after the killing?
A. The killing occurred on Saturday evening, I think and this was on Thursday morning.

Q. Who was present?
A. Me and Mr. Reeves.
Q. Where were you?
215 A. In Doyle's yard.
Q. How came this conversation to come up?
A. I was up there as I had been—we were just merely speaking of the matter. I suggested it to be a bad circumstance.
Q. What did he say?
A. He said—he said—he said, I knew we were all carrying guns for each other, but I did not think it would amount to anything, I thought it would be a bluff.
Q. Who did he mean?
A. I do not know, that is all he said.
Q. What did you say?
A. Nothing.
Q. What did you say before?
A. I said it was a very bad thing, I said It is a very bad thing for such things to happen.
Q. Was there anybody present but you and Reeves?
A. No sir.
That is all.

Witness excused.

Mr. CHARLIE TROTTER called and sworn for the defendant as a witness, testifies as follows:

Direct examination by H. M. FURMAN:

Q. Are you acquainted with Dick and Solon Reeves?
A. Yes sir.
Q. I will ask you if about nine months before Doyle was killed if Dick and Solon Reeves did not come to your father's place, and in your presence ask your father if he had heard Mr. New say anything about them, and your father replied no. And Dick replied He has been talking about us, and they was in a good notion to go up there and call him out and beat him? Did you hear him say such a thing?
A. Yes sir.

Cross examination by T. A. EDWARDS:

Q. When?
A. Something over a year ago.
Q. Where?
216 A. At my father's place, house.
Q. What was said?
A. What was said?
Q. Yes sir what was said?

A. Well sir, he just asked him——
Q. Who just asked him?
A. Mr. Reeves asked my father if he had heard New say anything about him.
Q. Go ahead, asked him if he had heard him say anything about him. Who?
A. New.
Q. What else?
A. He said he had been talking about them.
Q. What else?
A. He said they had heard he had been talking about them and they had a notion to go and whip him.
Q. Was they mad?
A. I did not ask them, I did not know.
Q. They did not appear to be?
A. I cannot state,
Q. When did you next think of that? What fixed that on your mind?
A. Hearing them say it.
Q. Did you think anything about it?
A. Not much.
Q. When did you next think about that?
A. About what?
Q. About that conversation?
A. I just heard them say it.
Q. Well, did you think anything more about it after they said it?
A. I just remember hearing them say it and that is all.
Q. When did you remember it again after that?
A. I never did forget it. I heard them say it.
Q. When was it next called to your mind? Did you think about it during that nine months?
217 A. No I just heard it, I just had a recollection of hearing them say it that is all.
Q. When did you next see the Reeves boys?
A. I do not recollect. I saw them around ever- once in a while.
Q. Did you ever see them with New after that?
A. No sir.
Q. Ever hear any more talk about it?
A. No sir. That is all I recollect of hearing them say.

Witness excused.

Mr. G. B. TROTTER, called and sworn for the defendant, testifies as follows:

Direct examination by Mr. H. M. FURMAN:

Q. Mr. Trotter I will ask you if Dick Reeves and Solon Reeves came to your place before the killing, when your boy was present, and ask- you if you had heard John New, *had heard John New* say

anything about them, and you said no. And they said he had been talking about them, and they had a notion to go up there and whip him?

A. Yes sir.

No cross examination. Witness excused.

Mr. BURROUGHS called and sworn as a witness for the defendant, testifies as follows:

Direct examination by H. M. FURMAN:

Q. Where do you reside?

A. Salyer, Texas.

Q. Do you know Dick Reeves?

A. Yes sir.

Q. Did you see him in Salyer on Thursday or Friday after Doyle was killed?

A. Yes sir. I think so, yes sir.

Q. Going back from the funeral?

A. Yes sir he said so.

Q. Did you have a conversation about this matter then?

A. Yes sir.

Q. Did he make this statement to you: That we, Reeves and Doyle was coming along the road and saw New, and he told
218 Doyle, Yonder is that fellow now, and you had better look out, and Doyle begun to get his pistol loose, it was pinned in, in the inside pocket of his vest, and New went and got his gun, and that he jumped out and run like hell and that Doyle kept on trying to get his gun until New shot one of his horses?

A. That is about what he told me as near as I can remember.

Cross examination by T. A. EDWARDS:

Q. Where do you live?

A. Sanger, Texas.

Q. How long have you lived there?

A. A little over a year the last time.

Q. Where had you been living before?

A. Collin county.

Q. Did you know John New there?

A. Yes sir.

Q. How long?

A. All my life.

Q. Related to him in any way?

A. No sir.

Q. Are you related to any of his family?

A. No sir.

Q. Where did you live at after you left, you say you lived in Collin county before you went to Sanger?

A. Yes sir.
Q. Where did you live before?
A. I was born in Grayson county. I lived in Collin county about all my life. Except when I lived in Sanger.
Q. When did you first make New's attorneys acquainted with the fact that Reeves made this statement to you?
A. I told my father and I suppose that he told New's father.
Q. How are you up here? Who brought you here?
A. I came on a summons.
Q. Who is paying your way?
A. Mr. New.
219 Q. Who was it that you slapped your hand on your pocket and told him that you was coming up here?
A. Maybe I did, yes sir.
Q. Do you know that constable at Sanger?
A. Yes sir.
Q. What is his name?
A. Stephens.
Q. Did you slap your hand on your pocket and tell him that you had the chink to come here with?
A. No sir.
Q. Where were you when this conversation took place?
A. In old man King's saloon.
Q. Drinking?
A. No sir.
Q. What was you doing?
A. I was only lounging around, not doing anything?
Q. Lounging round, what was said in there?
A. Dick came in and we spoke and I asked if there was any news. He said I suppose you have heard our trouble and I said no. He then told me.
Q. What did he tell you.
A. He said John New killed Doyle last Saturday. I asked him how came that and he told me that he and Doyle was driving along in a wagon, and that he told Doyle, Yonder is that fellow, he had better be on his guard or something like that, and he then began to try to get his gun unfastened. He said he had——
Q. Who said this?
A. Doyle—— *A.* He had it fastened in his inside vest pocket with a safety pin, and that New went and got his gun and began to shoot. And that the two first shots came nearly hitting him, then Doyle and I jumped out and run like hell, and Doyle jumped out and was trying to hold his horses and get his gun also,
220 and that New shot one of his horses and that they got away and run off. And that is about all.
Q. You know that Reeves told you that Doyle had a gun?
A. Yes sir.
Q. In his inside pocket?
A. Yes sir.

Q. Vest pocket?
A. Yes sir.
Q. Which side?
A. I do not know.
—. And pinned with a safety pin and he took hold of it and took it out.
—. Yes sir.
Q. How many efforts did he say he made to get it out?
A. He did not say.
Q. And he said that he jumped out and tried to get his pistol, kept trying?
A. Yes sir, that is what he said.
A. Yes sir that is what he said.
Q. And as soon as Doyle saw New he began to try to get his pistol?
A. He said he told him—And yonder is that fellow, and told him You had better be on your guard, and he then began to work at his pistol.
Q. Which side did he say it was on?
A. I do not know He did not say.
Q. He dropped his lines?
A. I do not know.
Q. All you know is that he made a surge?
A. I did not say anything about a surge. I said he just kept trying to get his pistol.
Q. He did not saw how?
A. No sir.

Stand aside. Witness excused.

221 Mr. W. J. TILLFORD, called and sworn as a witness for the defendant testifies as follows:

Q. Are you acquainted with Dick Reeves?
A. Yes sir.
Q. Did you meet him in the town of Port or West Wood on the morning before the killing of Doyle?
A. Yes sir.
Q. Did he state to you that he was going to Combs to stay until the small pox scare was over? And that he was going to raise a little hell and I asked him What kind and he said I would hear of it, and he said he was going to run John New off and I said Maybe John won't run, and he said If he don't I will kill him?
A. Yes sir.
Q. Did you know Doyle?
A. Yes sir.
Q. About the first of March, 1900, did you meet Doyle near Combs?
A. Yes sir.

Q. Did he make a statement to you in reference to New and if so please state what it was?

Objected to. Sustained. Exception.

By the COUNSEL FOR THE DEFENDANT: On what ground—I will state the ground on which I think it is competent.

By the COURT: Any threats made by Doyle, with no ground laid for them are incompetent.

Witness excused.

Mr. G. W. THARP called and sworn as a witness for the defendant testifies as follows.

Direct examination by Mr. FURMAN:

Q. You may state your name?
A. G. W. Tharp.
Q. Do you know the defendant, New?
A. Yes sir.
Q. How long?
A. About fifteen years.
Q. Where all?
222 A. No principally in Collin county and the Cheyenne country.
Q. How long have you lived here?
A. Something over a year.
Q. How long did you know him in Collin county?
A. I lived neighbor to him ten years, and then I lived in old Oklahoma five years, and then went back to Collin county and stayed five months.
Q. Do you know his general reputation in that community, where he has resided, for being a quiet, peaceable, law abiding man generally?
A. It was good.

Witness excused.

Mr. BROWN called and sworn as a witness for the defendant testifies as follows:

Direct examination by Mr. FURMAN:

Q. Do you know the defendant?
A. Yes sir.
Q. How long?
A. About twenty years.
Q. How long have you lived here in this county?
A. Two years this coming December.

Q. State your acquaintance during that time whether you have known him well or not?
A. Yes sir.
Q. Can you tell the jury what has been his general reputation in the communities where he has lived for being a law abiding, quiet, peaceable citizen?
A. Why it has always been that way.
Q. Good or bad?
A. It has been good.

Witness excused.

Mr. WILEY WILLIAMS called and sworn as a witness for the defendant, testifies as follows:

Direct examination by Mr. FURMAN:

Q. Are you acquainted with the defendant?
A. Yes sir.
223 Q. How long have you known him?
A. Something near three years.
Q. Since he has been living down here near Combs?
A. Yes sir.
Q. Do you know what his general reputation has been down there as to being a peaceable, unoffensive, law abiding citizen or not?
A. Yes sir.
Q. Has it been good or bad?
A. It has been good.

Cross examination by T. A. EDWARDS, county att'y:

Q. Did you ever hear of him being in any trouble down there?
A. None except with Mr. Doyle.
Q. You heard of him being in trouble with him before?
A. With Doyle before this killing, yes sir.
Q. When?
A. Along in the spring or summer before.
Q. You know of them being in court?
A. Yes sir. A little case before the justice court I think. I heard of it. I was not present.
Q. Did New ever tell you how that trouble arose out there?
Q. What trouble? (By the witness.)
Q. Either one of them.

Objected to. Overruled. Exception.

A. I do not think that Mr. New ever told me how it originated as I remember of.

Witness excused.

Mr. MUMSEY called and sworn as a witness for the defendant:

Direct examination by Mr. FURMAN:

Q. Where do you reside?
A. Collin county, near Salina, Texas.
Q. Do you know the defendant?
A. Yes sir.
Q. How long?
224 A. Twenty-five years. Maybe something over.
Q. Where did you know him?
A. In our neighborhood.
Q. How far did you live from him?
A. I do not know, three or four or five miles. Sometimes closer. They rented.
Q. Do you know what his general reputation was down there in that community the time that you knew him, as to being a law abiding, peaceable, unoffensive citizen or otherwise?
A. It was good so far as I ever heard.

Cross examination by T. A. EDWARDS, county attorney:

Q. How far did New live from you?
A. Sometimes closer than others, three or four miles sometimes, and sometimes four or five.
Q. How long?
A. Twenty-seven years.
Q. Lived here all that time, who did you hear talk about him?
A. I do not know as I can state.
Q. Who did you hear state that he was a good man?
A. I saw him every few days and I saw him at my place, and through the neighborhood, and at the post office, and other places. I saw him every few days.

Witness excused.

Dr. CLAY *on* called and sworn for the defendant as a witness testifies as follows:

Direct examination by H. M. FURMAN:

Q. Where do you reside?
A. Salina, Collin county, Texas.
Q. Do you know the defendant?
A. Yes sir.
Q. How long?
A. Exactly I cannot tell. It has been ten or twelve, I expect or maybe fourteen or fifteen years.
Q. Did you live near him?
A. About three miles.

225 Q. Do you know what has been his general reputation in that community for being a quiet, peaceable, law abiding inoffensive citizen in that community?

A. It was good.

Witness excused.

Mr. JOHN PERKINS a witness for the defendant, called and sworn testifies as follows:

Direct examination by Mr. FURMAN:

Q. Do you know the defendant John New?

A. Yes sir.

Q. How long?

A. I suppose about twenty-seven years. All his life nearly.

Q. How long did he live a neighbor to you, if at all?

A. Well he has lived five or six years right door neighbor, next door neighbor.

Q. During the time that you have known him have you known his general reputation as to being a peaceable, quiet and law abiding citizen or otherwise?

A. Yes sir. Yes sir as good as we had in our county.

Witness excused.

By the COURT: That is enough on that proposition.

By the COUNSEL FOR THE DEFENDANT: We have another witness or two on the same matters.

By the COURT: That is enough.

By the COUNSEL FOR THE DEFENDANT: Mr. New take the stand.

Mr. JOHN T. NEW, the defendant, sworn as a witness in his own behalf, testifies as follows:—

Direct examination by Mr. FURMAN:

Q. You live down here near Combs?

A. Yes sir.

Q. How long have you lived in this county?

A. About three years.

Q. Where did you come from?

A. Collin county, Texas.

Q. Did you ever have any trouble in your life with any man except Doyle?

226 A. No serious trouble, no.

Q. Please just tell the jury now in your own way beginning that morning, or that evening it was, in the evening that the trouble occurred and just tell the jury in your own way how you came to be out at the fence, and how that trouble came up.

A. Well in the evening, an hour by sun or perhaps an hour and one half, it had been a nice warm day and I had been sick.

Q. What was the matter?

A. The grippe and the measles on top of that. I was what I call on the puny list. I had been sick and had been indoors about two weeks or ten days, only about three days. I was anxious to stroll off for a little recreation. I thought I would go and kill some ducks.

Q. Was there any ducks in your pasture?

A. Yes sir, there is a creek there and you could see ducks flying around. It was a little ravine, I could see ducks lighting down that way. I thought I could go and get one or two or two or three I do not know just how many I did expect to get. I was down there and I did not kill any. They flew before I got close enough. I strolled on down that ravine, thinking I would find some more. I got down close to the section line, the big road a couple of hundred yards. I saw a steer out in the road that I thought was mine. I had some that had been getting out. I had some boys working on the fence. They had told me that they had not quite got it finished. Austin had. He was working for me at that time. I went down and it was my steer, and I got through the fence and laid my gun down. When I got through the fence I run him back right by the gate, it was a wire gate and he galloped in. The bottom wire being slack. He galloped in. I tacked up the wire. There was some steeples out of the post that held the wire up, when I got there. I taken a piece of wire off the post and went back to the gate. But before I got back I saw Doyle and Reeves coming, I supposed it was. I knew them and supposed it was them. I saw Doyle running around the horses that was loose. I thought they was going into
227 Lightfoot's house, he got out and headed them and gave them a scare and they came trotting down the road. And he taken the lines and came driving down. I started on down and they was at that time as much as fifty yards this side of Ben Lightfoot's place. Fifty yards closer than when I first saw them. I went down and began to work at the fence and I looked up and saw that it was Reeves and Doyle coming. I kept on working and looked up the second time. At that time they was in about forty or fifty yards. I saw Doyle reach in his bosom like that—indicating in his own bosom—and he began to jerk at something I supposed a pistol. I just reached down and picked up the Winchester and fired.

Q. Had you ever received any information as to any threats made by Doyle?

A. I had.

Q. State what?

A. My wife had told me at different times that he had made threats, and Mr. Powers had told me in Texas in January that Doyle had said that if things kept coming the way they was he was going to kill me.

Q. Had you had hard feelings with him?

A. Yes sir.

Q. How long standing?

A. We never had had serious trouble, it was in March a year ago. This was the first of March.

Q. What made you fire the first shot?

A. I was afraid he would kill me.

Q. What made you afraid, why was you afraid?

A. He had threatened to do so, and he reached into his bosom and I was afraid he would kill me.

Q. Tell what happened.

A. I shot the first shot and him and Reeves jumped out on the opposite side, I could only see their heads and I shot the second time. I had kept right with the wagon until they passed, and then the team had run by. And they was in plain view and I shot two or three times more.

228 Q. What was Doyle doing when in plain view?

A. Working at his breast trying to get his pistol out.

Q. What did Reeves do?

A. He turned and run back west. I do not know what he done, I saw him pass me going back west. I never looked to see.

Q. You say that after the team passed that you saw Doyle holding his hand there in his breast and you shot twice more?

A. Yes sir, I quit shooting when he was something like one hundred yards from me. I quit shooting. I ceased firing and he checked up, and turned and looked back, and commenced working at his breast again, like he was trying to get his pistol out.

Q. What did you do then?

A. I laid the gun on a post and shot him.

Q. What did he do?

A. He ran and kept running.

Q. Did you know whether you hit him that shot or not?

A. I thought I did. He throwed his hand on his leg and I thought I had hit him.

Q. What did you do?

A. I followed him to the house?

Q. What made you follow him?

A. I was afraid he would turn and shoot me.

Q. Was you out of shooting distance?

A. No sir.

Q. How far away was you?

A. About one hundred yards.

Q. You heard the testimony of Mrs. Trotter about what occurred at the door, that you promised her not to go in, if you made such a promise tell why you made it?

A. I did.

Q. Why.

A. Because I was afraid he would shoot through the door or out of the door and kill me while they was holding me.

229 Q. Did you go in the room?

A. I did.
Q. What did you do?
A. I shot him.
Q. What was he doing?
A. He was sitting on the floor behind the door. When I opened the door I saw him there behind the door.
Q. What did you do?
A. I saw him there behind the door when I opened the door and I shot him as quick as I could.
Q. What was he doing?
A. Still working at his left breast.
Q. What did you do after you shot him?
A. Struck him with the gun.
Q. Where?
A. In the head.
Q. Did you do anything after that?
A. I turned and walked out.
Q. Where did you go, what about that horse?
A. I had a team there that had gone down for a load of hay, and a wagon, and I got a horse and got onto it.
Q. Where did you go?
A. I went back down to where the section line running north and south, and turned down and went south a mile or something like a mile, maybe a little over.
Q. Where were you going?
A. I though- I would go off some place for safety.
Q. Did you come back?
A. I did.
Q. What for?
A. I meant to state about that. I was bareback, and the horse I was riding was a poor backed horse, and he had been working all day. I had galloped off, and I thought if I had borrowed a
230 saddle, and then I thought it would bring, he had borrowed a saddle would be into trouble and I did not want to get any body into trouble for my troubles. I turned around and came back to the gate, up there where the firing first begun, and then I took a notion I would go down and see if he had any Winchester or shot gun in the wagon, in Doyle's wagon, and I rode down and looked in the wagon, and did not see anything. I then rode up towards home, started home.
Q. What do you mean when you went away for safety?
A. Well Dick Reeves and Solon Reeves and old man Reeves and Doyle were all enemies of mine, and I was afraid they would come up home and kill me, or I would have to kill some more—some of them.

No cross examination. Witness excused.

Mr. TILLFORD recalled for the defendant.

Direct examination by Mr. FURMAN:

Q. I will ask you if you ever heard Mr. Doyle make any threats against New, and if so state what and when?

A. About the first of March I met him about one half mile east of Combs. He stopped and spoke. And said Where have you been? I said Down to New's. And he said I want to ask you one question. He said Did you ever hear him say anything about me? I said No. He said He does talk about me and I will stop it. If I ever get him in the right place, some powder will burn.

Cross examination by Mr. EDWARDS, county attorney:

Q. That was Reeves?

A. No sir, Doyle.

That is all.

Witness excused.

Mr. W. F. THARP, recalled for the defendant.

Direct examination by Mr. FURMAN:

Q. Where do you live?

A. Clinton county, Texas.

Q. Did you know the deceased in his life time?

A. Yes sir.

Q. I will ask you if about the first of May, 1900, the first
231 day of May, last year you was in this Territory?

A. Yes sir.

Q. At Doyle's house?

A. Yes sir.

Q. And was John Ferris with you?

A. Yes sir.

Q. If Doyle said anything about New, made any threats, tell the jury what he said.

A. Yes sir he made some threats. The first thing that was said was that they had had some trouble and had had a trial at Woods.

Q. What did he say?

A. He said that he could not get justice in the courts, and was going to take the thing in his own hands, he was going to revenge himself.

Q. Did he show you anything?

A. Yes sir.

Q. What?

A. A six shooter.

Q. What kind?

A. A large blue looking pistol. Black handled.

Q. Did he say how he came to get it.

A. He said to revenge himself with and to protect himself with.
Q. Who was he talking about?
A. John New.
Q. What did he say about his habit of carrying it with him? Did he say anything about carrying it?
A. Yes sir he said he carried it every where he went?
Q. Did he say anything about any previous difficulty or feeling between him and New? Q. About any past difficulty between him and New?
A. No sir I don't know as he did.
Q. About any trouble that he had had with New before?
232 A. Yes sir.
Q. What did he say?
A. He said that they had had some trouble I do not recollect, how he did bring that in. He said so much about it.
Q. Did he say anything about a boot leg?
A. Yes sir, he said in the field he had his pistol in his boot leg, and was in an unhandy place, and could not get it out, or he would have killed him that day.
Q. Did you see New after that?
A. Yes sir.
Q. I mean Doyle after that?
A. Yes sir.
Q. Where?
A. At his fence in passing by. In passing the road.
Q. Did you have any conversation then?
A. Yes sir.
Q. What was it?
A. Well he asked me if I had a place yet and I said I did not. He said he knew where I could contest and get one. I asked where and he said I could contest New, and get one.
Q. What else did he say?
A. Well he said I could contest him and get his place.
Q. Now tell the rest of it? If he did say anything more.
A. I cannot recollect hardly what he did say.
Q. Did you give him any advice to drop his trouble?
A. Yes sir, I told him he had better drop it. He said he would not do that it had gone too far. He said that he intended to kill him ever since he accused his brother Jim of stealing a horse in Collin county sometime before.

Cross examination by Mr. T. A. EDWARDS, county attorney:

Q. When was this?
A. I think about the first of May, 1900.
Q. About a year before this trouble occurred?
233 A. Yes sir.
Q. Where were you when you had this conversation?
A. In the road at Doyle's house.

Q. Was that about the time of this old trouble?
A. Yes sir.
Q. It was immediately after they had been in court?
A. Yes sir.
Q. He did not tell you about that trouble?
A. Yes sir.
Q. And said that he had a pistol?
A. Yes sir.
Q. And said that he had run?
A. No sir.
Q. Did he not tell you that he had run into the house?
A. No sir.
Q. New, he said he had come out there in the field.
A. I do not remember, I think he said so.
Q. You live in Collin county?
A. No sir, Denton county.
Q. How long have you known the defendant?
A. 13 or 14 years.
Q. A particular friend of the defendant's?
A. No sir.
Q. Have been very active in looking up the evidence in this case?
A. No sir.
Q. When did you tell the defense in this case about this?
A. I do not know, I did not tell them before the trial commenced. I told them before the trial commenced.
Q. You wanted to be a witness?
A. No sir.
Q. You came here all the way from Texas didn't you?
A. Yes sir.
Q. Very much interested?
A. Yes sir.
234 Q. Want to see him get out of it?
A. Yes sir I would like to.

Witness excused.

Mr. JOHN W. HOWELL called as a witness on behalf of the defendant testifies as follows:

Direct examination by Mr. FURMAN:

Q. Do you know Henry Doyle?
A. Yes sir.
Q. Was you at his house in 1900?
A. I was at his house in August, 1900, never met him before
Q. Where do you live?
A. Texas.
Q. What part?

A. Collin county.
Q. What part?
A. Roselyn post office.
Q. In August, 1900, did you have any conversation with the defendant New?
A. Yes sir, I stopped with him one night in 1900, and was looking over this country for a place, and asked him for information in regard to where I could find a place, and I told him about the amount of means that I had to pay for a place.
Q. Tell what he said?
A. He said he could tell me of a claim that would beat buying one.

By the COURT: Do not state anything that he said except as to the personal safety of New.

(NOTE BY THE STENOGRAPHER)—On page 174 where the question appears "In August 1900, did you have any conversation with the defendant, New," the attorney for the defendant probably made a mistake in the name, and may have meant Doyle, as would seem to be indicated by what follows.)

235 A. He spoke of some difficulty, and he said that he regretted that he didn't kill him at that time.
Q. Was anything said about what he would do in the future?
A. He said if the same opportunity was afforded again he would do it.

Cross examination by T. A. EDWARDS, county attorney:

Q. Did he tell you about that trouble?
A. Yes sir he said something of it.
Q. Did he say that New came into his own field with a gun? Did he tell you that?
A. No sir, he said something about throwing a piece of metal.
Q. Who?
A. New.
Q. That was in Doyle's own field?
A. I do not know. He was telling me about that a short time after it happened. I do not know.
Q. Did he not tell you that after New came out—did he not tell you that if New came out into his own field on him again that he would protect himself, or that he would do so and so.
A. No sir.
Q. Did he say something to amount to that?
A. I did not understand it that way.
Q. Do you know whether you understood it as he meant it?
A. I just understood that if the same opportunity, whatever it was, but what the conditions were before I did not understand.
Q. You live in Texas?
A. Yes sir, Collin county.

Q. When did you communicate your information to the defense?
A. I never did.
Q. How did they know, how do you come to be here?
A. They subpœn-ed me.
Q. And they are paying your way?
236 A. I am paying my own way.
Q. Paying your own way?
A. I do.
Q. You are pretty much interested?
A. I do not know as I am.

Witness excused.

Mr. W. A. POWERS called as a witness for the defendant, testifies as follows, after being first duly sworn.

Direct examination by Mr. FURMAN:

Q. Did you know the deceased in his life time?
A. Yes sir.
Q. I will ask you if you met Doyle in April, 1900, down in Texas?
A. Yes sir.
Q. Now under the ruling of the court, and it is the law, you can tell no preliminaries, just come to the point. I will ask you if Mr. Doyle said anything to you about Mr. New in the line of a threat, leave out everything else?
A. Yes sir.
Q. Tell the jury what it was. Leave out every other matter and come to the point.
A. He asked me if I had done threshing for him. He said Mr. New was telling out here that he could not get hands to help him. I told him he always had got help, that New helped him the year before. I asked him if they was still at outs and I said he had better drop it. And he had better drop it. He said no, he would kill him first.
Q. Did you communicate that to New?
A. Yes sir.
Q. Where?
A. In Texas.
Q. What did you tell him?
A. I told him to watch him that he might kill him, that he appeared to be pretty mad at him.

Witness excused.

237 Mr. MCCARTY called as a witness for the defendant, and being duly sworn, testifies as follows:—

Q. Where do you live?
A. Southwest of here.

Q. Did you know Doyle in his life time?
A. Yes sir.
Q. Now just leave out, I want to come right down to the point, any preliminary conversation. If you ever heard Doyle make any threat to kill New, tell it and leave the rest out.
A. Yes sir.
Q. Just tell what you heard him say.
A. I heard him say he would kill him before the year was out.
Q. You heard him say that?
A. Yes sir.
Q. Did he say why or put any ifs in it?
A. No sir.

Cross-examination by T. A. EDWARDS:

Q. When?
A. Last year, July or August.

Witness excused.

Mr. JOHN FERRIS called and sworn for the defendant, testifies as follows:

Direct examination by Mr. FURMAN:

Q. Did you know Doyle in his life time?
A. Yes sir.
Q. Sometime in May, 1900, was you at his house with Tharp?
A. Yes sir.
Q. Did he make any threats about New at that time?
A. Yes sir.
Q. Tell the jury what he said, the threats and leave the other part out.
A. Well to the best of my recollection he said he had tried the court, justice of the peace, and had failed, and that he was
238 going to take it in his own hands that he had failed to get justice in the court.
Q. Did he show you anything?
A. Yes sir.
Q. What?
A. He showed us a gun.
Q. What kind of a gun?
A. It was a black handled pistol.
Q. Large or small.
A. It looked to be a forty four.
Q. Did he say anything about how he came to get it or anything of the sort, or what for?
A. He said he had a good gun, and showed it in his vest pocket, and was going to kill New.

Q. Was going to kill whom?
A. New.
Q. Did he say anything about any troubles between him and New or anything?
A. Yes sir.
Q. What did he say about that?
A. Well he said that New had intimated that his brother had stolen some horses, and that he had made up his mind to kill him ever since he had made that statement.
Q. Do you know what his habit was as to carrying his arms?
A. I saw him several times with a shot gun.
Q. Do you know how it was loaded?
A. He told me once it was loaded with buckshot.
Q. Did he say what his custom was what kind of shot he was in the habit of loading it with?
A. No sir.

Cross examination by T. A. EDWARDS, county attorney:

Q. This talk was in May, 1900?
A. About that time.
239 Q. Just after that other trouble they had had there in the courts.
A. Yes sir.
Q. He told you about that trouble didn't he?
A. Yes sir.
Q. And told you about New coming into his own field onto him did he not?
A. Well he told something about them having a difference down about the field.
Q. You say that you saw him with a shot gun?
A. Yes sir.
Q. Did you ever see anybody else out there with a shot gun?
A. Yes sir.
Q. Ever see New with a gun?
A. Yes sir.
Q. Did you ever see him with a pistol?
A. No sir.
Q. Did you ever let him have a pistol?
A. I believe I did.
Q. Just before that other trouble didn't you?
A. I let him have a pistol some time shortly after I moved there.
Q. He had your pistol at the time that he went into the field on Doyle didn't he?
A. I do not know.
Q. Was your pistol at home then?
A. I do not recollect.
Q. Now do not you remember that the time of that conversation that Doyle told you that that trouble came up, out there in the field,

at the time that Doyle was talking to you did he not tell you that the trouble that he and New had was out there in Doyle's field?

A. Yes sir.

Q. And about New coming over into his field?

A. Yes sir, something of that sort, something about some cattle.

240 Q. And of New throwing a piece of metal at him?

A. No sir.

Q. Did he say anything about New making a gun play at him? Did he not say that New drew a gun on him in the field, a pistol.

A. To the best of my recollection he did.

Q. And that was your pistol?

A. I do not know.

Witness excused.

The defendant rests.

By the COURT: Any rebuttal?

By the COUNTY ATTORNEY: No sir. The Territory rests.

TERRITORY OF OKLAHOMA, *County of Canadian,* } ss:

I, T. F. Millikan, court reporter of the above named court, do hereby certify that the above and foregoing is a full, true, complete and correct transcript of my short-hand notes of the evidence in said cause, taken at the trial thereof, and that the same is a full, true, complete and correct transcript of all the evidence introduced in the trial of said cause.

T. F. MILLIKAN,
Court Reporter.

That thereupon, and at the close of the testimony for the plaintiff and defendant in said cause, the court instructs the jury as to the law, in writing, which said instructions and the exceptions saved thereto, are in words and figures as follows, to-wit:

241 TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW. } Defendant's Request No. 5.

You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gun-shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant.

Refused, exception by defendant. C. F. I., judge.

Endorsed on the back as follows—317—317. Territory vs. New—Defendant's request for instructions. Instruction asked by defendant and refused. Judge. Filed 10–16–1901—E. M. Hegler, cl'k.

The court instructs the jury that under the laws of this Territory the killing of a human being is murder in the following cases:

1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

3. When perpetrated without any design to effect death, by a person in the commission of a felony.

242 The jury are instructed that under the laws of this Territory homicide is excusable in the following cases:

1st. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon any sudden combat, provided that no undue advantage is taken, or any dangerous weapon used, nor the killing done in a cruel or unusual manner, and under the laws of this Territory homicide is justifiable when committed by public officers, and those acting by their command, and their aid and assistance in the following cases:

1. In obedience to any judgment of any competent court.

2. When necessarily committed in overcoming actual resistance, to the execution of some legal process, or to the discharge of any other legal duty.

3. When necessarily committed in retaking felons, who have been rescued or who have escaped, or when necessarily committed in arresting felons fleeing from justice.

Under the laws of the Territory of Oklahoma, homicide is also justifiable when committed by any person in any of the following cases

1. When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house, in which such person is.

2. When committed in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress or servant, when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished.

243 3. When necessarily committed when attempting by lawful means to apprehend any person for any felony committed, or

in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

The jury are instructed further that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case, and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and acquit the defendant unless they feel compelled to find him guilty as charged, by the law of the land and the evidence of the case, convincing them of his guilt as charged, beyond all reasonable doubt.

3. Given, C. F. I. judge. Exception by defendant.

The jury are instructed that under the laws of this Territory the defendant in a criminal case is a competent witness in his own behalf, and the jury have no right to disregard his own testimony from mere caprice, and from the fact alone that he is the defendant, and stands charged with the commission of a crime, but, taking into consideration his interest in the event of the suit, they should weigh his testimony in the light of all the other facts and circumstances in evidence, and should give it such weight as they believe it justly entitled to.

4.

244 The jury are instructed that the defendant has put in evidence his general reputation as a person of quiet and peaceable disposition and such testimony is permissable under the law, and is to be considered by the jury as a circumstance in the case. But you are further instructed that if, from all the evidence in the case, you are satisfied beyond a reasonable doubt, of the guilt of the defendant, then it is the duty of the jury to find him guilty, notwithstanding the fact that heretofore the accused has borne a good reputation as a person of peaceable and quiet disposition.

5.

The court instructs the jury that the law is if a person is assaulted in such a way as to induce in him a reasonable belief that he is in actual danger of losing his life, or suffering great bodily harm he will be justified in defending himself, although the danger be not real but only apparent. Such person will not be held responsible criminally, if he acts in self defense, from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. A person need not be in actual imminent peril of his life or of great bodily harm, before he may slay his assailant, it is sufficient, if, in good faith, he has a reasonable belief, from the facts as they may appear to him at the time, that he is in such imminent peril.

6. Given, C. F. I. judge. Exception by defendant.

245 As a matter of law no one has a right to kill another, even in self defense, unless such killing is apparently necessary for such defense. Before a person can justify taking the life of a human being, on the ground of self defense, he must, when attacked, employ

all reasonable means within his power, consistent with his safety to avoid the danger and avert the necessity for the killing.

7. Given, C. F. I., judge. Exception by defendant.

While it is true that homicide committed in actual defense of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death, or great bodily harm from the deceased, and that his act in causing death was necessary, in order to avoid the death or great bodily harm, which was apparently imminent, *but* when there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or a violation of law on his part is the reason of his expectation of an attack, the plea of self defense cannot avail.

8. Given, Exception by defendant. C. F. I. judge.

The jury are instructed that justifiable homicide is the killing of a human being in self defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors by violence or surprise, to commit a felony on either. A bare fear of any of these offenses, is not sufficient to justify the killing.

It must appear that the circumstances were sufficient, to excite the fears of a reasonable man, and that the party killing acted under the influence of those fears.

9. Given, C. F. I. judge. Exception by defendant.

246 Your personal opinions as to facts not proven cannot properly be considered as a basis for your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that and that alone you must form your verdict, unaided, unassisted, and uninfluenced by any opinions or presumptions not founded upon the testimony.

10. Given, Exception by defendant. C. F. I. judge.

If after a candid comparison and careful consideration of all the evidence in the case, you have a doubt of the defendant's guilt, it will then be your duty to determine whether such doubt is reasonable and sufficient in law to acquit the defendant. And if after applying the law defining such doubt, as laid down in these instructions, you find that the doubt in question is not a reasonable one, then it is not sufficient in law to acquit the defendant. A doubt to justify an acquittal must be a reasonable one, *must be a reasonable one*, and it must arise from a candid and careful investigation of all the evidence in the case, and unless the doubt is a reasonable one, and does so arise, it will not be sufficient in law to authorize a verdict of not guilty.

11. Given, C. F. I. judge. Exception by defendant.

The jury are instructed that while the law requires that before a conviction can be had in a criminal case, the evidence must be so strong as to exclude from their minds all reasonable doubt of the guilt of the defendant, yet if after hearing all the evidence, and if after a fair, candid and impartial investigation and examination of

all the evidence, facts and circumstances in evidence in the case, the jury can say on their oath as jurors and their conscience as men, that they have an abiding faith in the truth of the charge contained
247 in the indictment, amounting to a moral certainty, then they are convinced beyond a reasonable doubt.

12. Given. Exception by defendant. C. F. I. judge.

The court instructs the jury that as a matter of law whoever is guilty of murder shall suffer punishment of death, or imprisonment for life at hard labor.

13.

The jury are instructed that if they find the defendant guilty of murder, they shall designate by their verdict whether he shall be punished by death or by imprisonment for life at hard labor.

14.

The jury are instructed that any testimony admitted by the court as to statements made by the witness Reeves, out of court, contrary to his sworn testimony, are only admitted for the purpose of impeachment. They are not of themselves any evidence that the defendant, New, acted in self defence at the time of the homicide, and the jury have no right to consider them for this purpose, except in so far as they tend to impeach the witness, Reeves.

15. Given / Exception by defendant. C. F. I. judge.

248 The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-grounded belief of danger to life or of great bodily harm, in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self defense.

15½. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that although they may believe from the evidence that at some time previous to the commission of the homicide, the deceased had made threats against the life of the defendant, and that such threats had been communicated to the defendant, and in consequence of such threats the defendant had prior to the homicide entertained fear that the deceased would do him bodily harm, and although they may believe from the evidence that in consequence of such threats and on account of the actions of the deceased just prior to the homicide, the defendant may have had fears that the deceased would do him some bodily harm at some future time, such fears would not justify the defendant in slaying the deceased but before the defendant can justify his action in slaying the deceased, it must appear from the evidence that such slaying was necessary, or appeared to be necessary in a reasonable and necessary defense of the defendant's life, and if the jury believe from the evidence in this case, that the defendant sought the deceased for the purpose of killing him, and that at the time the fatal shot was fired, there was no actual or apparent danger to the life or person of the defendant, from the deceased, and no grounds for a reasonable belief

thereof, in the mind of the defendant, then the killing of the deceased was not justifiable on the grounds of self defense.

16. Given. Exception by defendant. C. F. I. judge.

249 If the jury believe from the evidence beyond a reasonable doubt that at the time the fatal shot in this case was fired, by the defendant, the deceased had retreated from the defendant, and was at the time making no demonstration which indicated an intention on his part, to do the defendant any bodily harm, and that the defendant at the time was in no immediate or apparent danger of death, or great bodily harm, then the killing of the deceased by the defendant, is not justifiable on the grounds of self defense.

17. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that although they may believe from the evidence that before the defendant, New, fired the first shot, at the deceased, that the deceased made some demonstration which indicated an intention on his part to draw a gun, and that said New at that time had reason to believe, and did believe, that the deceased was about to draw a gun, for the purpose of assaulting the defendant, *at* that said New at said time believed his life or his personal safety was in imminent danger, yet, if they further believe from the evidence beyond a reasonable doubt, that before the fatal shot was fired the deceased had withdrawn from the scene of action, was fleeing from said New, and had retreated to a place of safety, and that said New followed the deceased, after the real or apparent danger was over, and without any reasonable belief on the part of said New that his life or personal safety was in imminent danger, said New shot and killed the deceased, in manner and form as charged in the indictment, then said New is guilty of murder and the jury should so find.

18. Given. Exception by defendant. C. F. I. judge.

250 The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that the defendant, New, could have withdrawn from the scene of the tragedy, with safety and could have gone away, from the scene of action with safety, to his life and person, without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and if you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary, in a reasonable and necessary defense of the life or person or habitation of said New, at the time of said homicide, then your verdict should be guilty of murder.

19. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that any fears that the defendant may have entertained of the deceased prior to the time of the homicide, as a result of any threats shown by the evidence as having been made by the deceased against the defendant, or any fears that the defendant may have entertained at the time of the homicide, that the deceased would do him bodily harm at some future time, will not be a proper basis for a plea of self defense, unless you believe

from the evidence that at the time of the homicide, the defendant had a belief based upon reasonable evidence that his life or personal safety was in imminent danger from the deceased at that time.

20. Given. Exception by defendant. C. F. I. judge.

251 The jury are instructed that your verdict in this case should be based entirely upon the evidence, facts and circumstances in evidence in the case, together with the law as given to you by the court, and if from all the evidence and the law, you are satisfied beyond a reasonable doubt that the defendant is guilty in manner and form as charged in the indictment, then you should find him guilty, that you have no right as jurors to go beyond the evidence to hunt up doubts, or to entertain doubts which are merely conjectural, and do not arise from a fair, candid, and careful investigation of all the evidence in the case, neither have you the right as a juror to doubt because you have sympathy for the defendant or the family of the defendant, or because a verdict of guilty would cause grief or sorrow to the defendant or his family. These are matters which you have a right to consider as men, but as jurors you have no right to allow them to in any degree enter into or cause you to form therefrom your verdict; you have no right as jurors to ignore, set aside or disregard the instructions of the court, as given you as the law of this case, but it is your sworn duty as jurors to decide this case solely upon the evidence, facts and circumstances in evidence as developed by the testimony, and the law as given to you by the court.

21. Given. Exception by defendant. C. F. I. judge.

The jury are instructed that these instructions should be taken as a whole, as the charge of the court giving the jury the law of this case, and they are further instructed that they are binding upon the jury, as the law of the case, and the jury have no right to disregard them, in determining the issues in this case.

22.

252 1. Asked by the Territory. Given. Exception by the defendant C. F. I. judge.

The defendant seeks to justify or excuse the killing on the ground of threats made by Doyle, to take his life and on the ground of self defense. Now threats by Doyle to kill New do not afford a justification for New killing Doyle, unless it be shown by the evidence that at the time of the killing Doyle by some act then done, manifested an intention to kill New or do him some great bodily harm. If the defendant at the time of the killing had a reasonable apprehension that it was the intention of Doyle to make an immediate assault on him, and take his life or do him some great bodily harm, he had the right to defend himself and it would make no difference whether the danger was real or imaginary so that it had the appearance of being real, and in determining the question of apparent danger, you should look at the facts from the defendant's stand-point. But in order for New to justify himself on this ground, you must believe from the evidence that the circumstances surrounding the

parties was such as to create and did create in the mind of New a *bona fide* apprehension on the part of New, that it was the intention of Doyle to make an immediate assault on him, the defendant, and take his life or do him some great bodily harm, and if you believe that the said Doyle, by some act done, or word spoken at the time of the killing, created in the mind of New a just and reasonable apprehension, of death, or serious bodily injury, and that the said New shot and killed the said Doyle, to defend himself from such danger, if any there existed, then you will find the defendant not guilty.

The defendant New had no right to kill Doyle under the apprehension that Doyle might kill him at some future time, and if you find that was the motive that induced New to kill Doyle, then he could not justify the killing on the ground of self defense.

253 II.

Where a defendant accused of murder seeks to justify himself on the grounds of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense, unless it be shown that at the time of the homicide the person killed by some act then done, manifested an intention to execute the threats so made.

Given. Exception by defendant. C. F. I. judge.

III.

Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances, reasonably indicate to be necessary.

Given. Exception by defendant. C. F. I. judge.

In no case can the killing of a human being be justified upon the ground of self defense, if the human being killed is in a terrified flight, and has passed completely away from the scene of the difficulty, and is merely seeking to save his life by flight at the time he is killed, and the party who does the killing has been in pursuit of the retreating human being for such a time, that he has time, as a reasonable human being, to know that the person killed is in flight, and not in fight.

4. Given. Exception by defendant C. F. I. judge.

254 TERRITORY
vs.
NEW.

No. 1.

At the request of the defendant the court instructs the jury — follows:

The jury are instructed as a matter of law, that if a person believes, and has a reasonable cause to believe that another has sought him out for the purpose of killing him, or of doing him great bodily harm, and that he is prepared therefor with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary, (if necessary,) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable upon the ground of self defense.

Modified by interlineation "(if necessary)" and given.

Interlineation excepted to by defendant. C. F. I. judge.

" complained of in parenthesis.

TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Defendant's Request No. 2.

In this case, the defendant pleads that in taking the life of the deceased, Doyle, he acted upon reasonable appearances of danger, of being killed by the deceased, or of receiving serious bodily harm at the hands of the deceased. In passing upon this defense, it is your duty to view the facts and circumstances occurring at the time of the killing, from the defendant's standpoint, as they then reasonably appeared to him.

Given. C. F. I. judge.

255 TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Defendant's Request No. 3.

Threats made by the deceased to take the life of the defendant, or to inflict serious bodily harm upon him, would not of themselves justify the defendant in killing the deceased. But if you find from the evidence that the deceased had threatened to kill the defendant,

or to inflict serious bodily injury upon him, and that those threats had been communicated to the defendant, prior to the killing, and that the deceased did some act just prior to (and at the time of) the killing, which manifested and indicated to the defendant, an intention on the part of the deceased to carry these threats into execution, and defendant then believed that deceased was about to assault him, and execute such threats, then the defendant would be justifiable in taking the life of the deceased, (but this would not justify the defendant in pursuing the deceased and killing him after the real or apparent danger was past).

Modified by interlineation (and at the time of) and by adding the words (But this would not justify the defendant in pursuing the deceased, and killing him, after the real or apparent danger was past).

Exception by defendant. C. F. I. judge.

256 THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW.

Defendant's Request No. Four.

To excuse himself in this case, upon the ground of self defense, it is not necessary that the defendant should have been in actual danger of losing his life, or of having serious bodily injury inflicted upon him by the deceased. It is sufficient in law, to justify the defendant in taking the life of the deceased, if, at the time of the homicide, it then reasonably appeared to the defendant from the acts of the deceased, considered in connection with the previous threats of the deceased, if any such threats appear from the evidence to have been made, that it was then the intention of the deceased to kill the defendant or to inflict serious bodily injury upon him, and, if you so find from the evidence, or, if from the evidence you entertain a reasonable doubt as to whether the defendant actually believed he was in danger, and such belief was based upon reasonable evidence of danger, and made the fatal assault while acting under such belief, you will acquit the defendant, although as a matter of fact, the defendant was in no actual danger at the hands of the deceased, at the time of the killing (provided you further believe from the evidence that the defendant believed such killing was necessary for such defense).

Modified by interlineation and additions as shown by parenthesis Exception by defendant. C. F. I., judge.

Said instructions indorsed on the back as follows: 317 Territory vs. New. Instructions. Filed 10–16–1901. E. M. Hegler, clerk.

That during the argument of said cause, and immediately following the giving of the instructions to the jury by the court as to the

law of said cause, the defendant, by his attorney files his bill of exceptions No. 1 in said cause which is in words and figures as follows, to-wit:—

257 In the District Court, County of Washita.

THE TERRITORY }
vs.
J. T. NEW. }

Bill of Exceptions.

1. Be it remembered that on the trial of said action the defendant excepted to each of the instructions given by the court on its own motion, numbered from No. 1 to No. 22 inclusive.

2. The defendant then and there also excepted to the giving of each of the instructions requested by the prosecution from No. 1 to No. 3 inclusive.

3. The defendant then and there also excepted to the modifications of defendant's request for instructions, in requests No. 1–3 and 4 inclusive.

4. The defendant also excepts to refusal of the court to give request No. 5 as made by defendant.

5. The defendant then and there also excepted to the instructions of the court, and to each thereof, on the grounds that the same fail, and each fails to present the law governing the case.

Allowed, C. F. Irwin, judge.

And said matters not being otherwise of record herein the said exceptions are hereby allowed and the same shall be made of record herein.

Indorsed: 317. Territory *vs.* New. Bill of exceptions. No. 1 Filed Oct. 16, 1901. E. M. Hegler, clerk.

That thereupon, and immediately following the instructions of the court to the jury, the counsel for the Territory, and the counsel for the defendant, argue said cause to the jury; that during the argument of said cause to the jury by the counsel for the Territory, the defendant by his attorney files his bill of exceptions No. 2 which bill of exceptions No. 2 and the endorsements thereon by the court and the clerk of said court, is in words and figures as follows, to-wit:

258 TERRITORY }
vs.
NEW. }

In the closing remarks of the counsel for the Territory the counsel said:

"Forrest and Furman bring this young fellow who hangs around

saloons in Texas to show what Dick Reeves said, why did they not get the written testimony of Dick Reeves taken before the coroner's jury, on the night after the murder. Why did they not get the justice who held the inquest, and heard Dick Reeves testify, to contradict him."

To these remarks the defendant excepts on the grounds that there is no evidence in the case which shows that any testimony was taken down in writing before the coroner's jury, and no evidence that Dick Reeves was a witness before such jury, and defendant requests the court to disregard the statements of counsel in said matter.

No such statement was made by counsel, and what counsel did say was not objected to at the time.

Refused by court. C. F. Irwin, judge.

Endorsed: 317 Territory *vs* New. Bill of exception No. 2. Filed 10–17–1901. E. M. Hegler, clerk.

TERRITORY OF OKLAHOMA, } *ss*:
Second Judicial District, County of Washita, }

In the District Court in and for said County, District, and Territory.

Be it remembered that on the 17th day of October, 1901, the same being the third judicial day of the district court of said county, district and Territory, aforesaid, for the regular October term, 1901, thereof, the court having been duly opened for the transaction of business the following proceedings among others were had, to-wit:

259 TERRITORY OF OKLAHOMA } #317.
vs.
JOHN NEW, Defendant. }

Comes now the Territory by its attorneys and the defendant in person into open court and by his attorneys; come also the jury in charge of their sworn bailiffs and all being present the trial of this cause is resumed. And now the defendant resumes and concludes his argument and the prosecution makes its closing argument. Whereupon the court submits the cause to the jury and swears bailiffs to take charge of them and said jury retire in their charge to consider of their verdict.

TERRITORY OF OKLAHOMA }
v.
JOHN NEW, Defendant. }

And now the defendant being present in person in open court and by his attorneys and files by his attorneys his bill of exceptions No. 2, which is refused by the court.

TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant.

Comes now defendant in person into open court and by his attorneys; comes also the jury in charge of their sworn bailiffs and all answer present. And now the jury by and through their foreman return and present the following verdict, to-wit:

"In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Verdict.

We, the jury, duly empaneled and sworn to try the issues
260 in the above entitled cause do upon our oaths find the defendant guilty of murder and fix his punishment at imprisonment for life at hard labor.

WILLIAM S. PETTY, *Foreman.*

In the District Court in and for Washita County, Oklahoma Territory.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Verdict.

We, the jury, duly empannelled and sworn to try the issues in the above entitled cause do upon our oaths find the defendant guilty of murder and fix his punishment at imprisonment for life at hard labor.

WILLIAM S. PETTY, *Foreman.*

Endorsed: 317—Territory *vs.* John New. Verdict. Filed 10-17-1901—E. M. Hegler, clerk.

Whereupon the court discharged said jury from further consideration of this case and announces Saturday morning, October 19, 1901, at 9 a. m. as date for hearing of motion for a new trial and for passing of sentence and remands the defendant to the custody of the sheriff.

261 TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant.

It appearing to the satisfaction of the court that the county jail of Washita county, said Territory, is insecure for the confinement of prisoners,

It is ordered by the court that the sheriff be and hereby is allowed six guards to assist in guarding said jail until further order of this court at the expense of Washita county, Oklahoma.

Ordered that court stand adjourned till tomorrow morning, October 18th, 1901, at 9 o'clock a. m.

C. F. IRWIN, *Judge.*

That thereupon, and on the 18th day of October, 1901, the defendant, by his attorneys, files in said court his motion for a new trial in said cause, which said motion for a new trial is in words and figures as follows, to-wit:—

THE TERRITORY OF OKLAHOMA, Plaintiff,
vs.
JOHN T. NEW, Defendant.
Motion for New Trial.

Comes now the defendant in the above entitled action, and moves the court to vacate and set aside the verdict of the jury in said action, and to grant the defendant a new trial therein, on the following grounds:—

First. The court erred in misdirecting the jury in matters of law, in the trial of said cause.

Second. The court erred in failing to direct the jury in matters of law as requested by the defendant, in said trial.

262 Third. The court erred in its decisions on questions of law, arising during the course of the trial.

Fourth. The court erred in failing to charge the jury that under the law, it might convict the defendant of manslaughter in the first degree.

Fifth. The court erred in weighing the evidence in said trial and in taking from the jury, the duty of determining in their verdict, the degree of homicide, of which the defendant should be convicted, if of any degree.

Sixth. The instructions of the court are erroneous, in that they are conflicting, and tend to confuse the jury as to the law of the case.

Seventh. The court erred in failing to state in its instructions to the jury the issues of fact submitted to the jury for its consideration.

Eighth. The court erred in giving its instructions number three.

Ninth. The court erred in giving the court's instructions numbers 5, 7, 8, 10, 11, 12, 15, 15½, 16, 17, 18, 19, 20 and 21.

Tenth. The court erred in giving the Territory's request for instructions numbers 1, 2, 3, and 4.

Eleventh. The court erred in modifying the requested instructions of the defendant, numbers 1, 2, 3 and 4.

Twelfth. The court erred in refusing the defendant's requested instructions number 5, to-wit:

TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW. } Defendant's Request No. 5.

You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased—that is, if you are in doubt as to whether or not he died from the effects of gun shot wounds, or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant.

Refused. Excep- by defendant. C. F. I. judge.

263 Thirteenth. The verdict of the jury is contrary to the law.

Fourteenth. The verdict of the jury is contrary to the evidence. That the substantial rights of the defendant are prejudiced by said verdict, to each and all of which said errors, the defendant duly excepted during said trial.

H. M. FURMAN,
FORREST, LOWE AND SCHILLER,
MASSINGALE AND AUXIER,
Attorneys for Defendant.

Endorsed: No. 317—Territory *vs.* John T. New. Motion for new trial—Filed Oct. 18, 1901. E. M. Hegler, clerk.

That thereafter, and on to-wit, the 19th day of October, 1901, the defendant, by his attorneys filed in said court, his motion in arrest of judgment, which said motion in arrest of judgment is in words and figures as follows, to-wit:—

TERRITORY
vs.
NEW. } Motion in Arrest of Judgment.

Comes now the defendant and moves in arrest of judgment on the grounds that the indictment does not state facts sufficient to constitute a public crime.

H. M. FURMAN,
FORREST, LOWE AND SCHILLER,
A. M. MASSINGALE, *Att'ys for Defendant.*

Endorsed on the back: No. 317. Territory *vs.* New. Motion in arrest. Filed Oct. 19, 1901. E. M. Hegler, clerk.

264 TERRITORY OF OKLAHOMA, } ss :
Second Judicial District, County of Washita, }

In the District Court in and for said County, District, and Territory.

Be it remembered that on this 19th day of October, 1901, the same being the 5th judicial day of the district court of said county, district and Territory, aforesaid, for the regular October term, 1901, thereof, the following proceedings among others were had, to wit:

THE TERRITORY OF OKLAHOMA
vs.
JOHN NEW, Defendant. } Judgment and Sentence.

Comes now the defendant in person into open court and by his attorneys, and this being the day set for hearing on the motion for a new trial and for judgment and sentence on the verdict of the jury heretofore rendered in this cause the said motion came on for hearing by the court and the court after argument of counsel and being duly advised in the premises overrules said motion to which ruling the defendant excepts and exceptions allowed, and now the court directs the said defendant to stand for judgment and sentence on said verdict, and informs him of the nature of the charge against him, his plea of not guilty thereto, and the verdict of the jury thereon, and asks him if — has any reasons to state why the judgment and sentence of the court should not be pronounced upon him and said defendant having no sufficient reason to assign, the court finds: that said defendant is by the verdict of the jury "guilty of murder and his punishment fixed at imprisonment for life at hard labor."

265 It is therefore ordered, considered and adjudged by the court that the defendant, John T. New, be confined and imprisoned for the period of his natural life at hard labor in the territorial penitentiary at Lansing in the State of Kansas. And the sheriff of Washita county, said Territory, transport and deliver the said defendant to the warden or other proper keeper of said penitentiary and take his receipt therefor and the said warden or other proper keeper of said penitentiary is ordered to receive and confine said defendant in said penitentiary according to the terms and commands of this judgment and sentence and a certified copy of this judgment and sentence shall be his full warrant and authority for so doing.

And now the court informs the defendant of his right of appeal to the supreme court of this Territory, to which judgment and sentence the defendant excepts and exceptions allowed.

C. F. IRWIN, *Judge.*

And afterwards on the same day, the further following proceedings were had in said case, to-wit:

TERRITORY OF OKLAHOMA
vs.
JOHN NEW.

Comes now the defendant in person into open court and by his attorneys. And now defendants asks and is given sixty days in which to prepare and serve his case-made for appeal to the supreme court and the Territory is allowed ten days therefrom to suggest amendments thereto, said case made to be settled and signed on five days' notice.

266 TERRITORY OF OKLAHOMA, } ss:
County of Canadian, }

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Certificate.

We hereby certify that the above and foregoing case-made, contains a full, true complete and correct transcript of all the pleadings, motions, orders, evidence introduced, objections made thereto, and rulings thereon, and exceptions saved, and of all of the pleadings and proceedings, filed and had in said cause, of every nature whatsoever, including a copy of the indictment and of the final judgment and sentence in said cause.

HENRY M. FURMAN &
FORREST & LOWE,
Attorneys for the Defendant.

Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

TERRITORY OF OKLAHOMA, } ss:
County of Washita, }

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Acceptance of Service.

We hereby accept service of the above and foregoing case-made, in the above entitled cause, this 10 day of Dec. 1901.

T. A. EDWARDS, *Co. Att'y,*
L. R. COWAN,
J. W. SMITH,
M. G. ABERNATHY,
Attorneys for the Territory.

Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

267 In the District Court for Washita County, Territory of Oklahoma.

THE TERRITORY OF OKLAHOMA, Plaintiff,
vs.
JOHN T. NEW, Defendant.

Acceptance of Notice for Presentation of Case Made for Signing and Settlement.

We, the undersigned attorneys for the above named Territory in the above entitled case, do hereby consent that the above and foregoing case made may be presented to the Hon. C. F. Irwin, judge of said court, for signing and settlement on the 8th day of January, 1902, at chambers in the city of Guthrie said Territory, hereby waiving further notice of presentation of the same and further notice of the signing and settlement thereof.

Dated this 3rd day of January, 1902.

T. A. EDWARDS,
County Att'y,
L. R. COWAN,
Ass't Co. Att'y,
Attorneys for the Territory.

Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

268 TERRITORY OF OKLAHOMA, } ss:
County of ——, }

In the District Court in and for Washita County, Oklahoma.

THE TERRITORY OF OKLAHOMA
vs.
JOHN T. NEW, Defendant. } Certificate.

I, C. F. Irwin, judge of the district court above named, do hereby certify that I was the presiding judge at the trial of the above entitled cause in the district court in and for Washita county, Oklahoma Territory; that the above and foregoing case made has been duly served in due time, and that it is true and correct and speaks the truth throughout, and that the same contains a true, full, complete and correct transcript of all the pleadings, motions, orders, evidence introduced, objections made thereto, and rulings thereon, and exceptions saved, and of all the pleadings and proceedings filed and had in said cause of every nature whatsoever, including a copy of the indictment, and instructions given and refused and of the

final judgment and sentence in said cause, and I hereby sign, settle, certify and allow the same as true and correct, and the clerk of said court is hereby ordered and directed to attest the same with his signature and the seal of said court and to file the same of record as the case made in said cause as provided by law.

Witness my hand at the city of —— this 8th day of January, 1902.

C. F. IRWIN,
Judge of the District Court in and for Washita County, Oklahoma Territory.

Attest:
E. M. HEGLER,
[SEAL.] *Clerk District Court, Washita County, Oklahoma Territory.*

Filed this 8th day of January, 1902, E. M. Hegler, clerk dist. crt. Washita county Oklahoma Territory. Filed Mar. 18, 1902, Benj. F. Hegler, clerk supreme court. By Florence N. Weirick, deputy.

269 Said case-made is endorsed as follows; No. 1210—John T. New *vs.* Territory of Oklahoma. Filed Mar. 18, 1902 Benj. F. Hegler, clerk supreme court, by Florence N. Weirick, deputy.

270 And on the 18th day of March, 1902, there was filed in said supreme court in said cause, a notice of appeal and proof service same which notice reads in words and figures as follows, to-wit:

TERRITORY OF OKLAHOMA, }
Washita County. }

In the District Court.

THE TERRITORY OF OKLAHOMA, Plaintiff, }
vs. } Notice of Appeal.
JOHN T. NEW, Defendant. }

To T. A. Edwards, county attorney of Washita county, and E. M. Hegler, clerk of the dist. court in and for said county:

Take notice that defendant in the above entitled cause, appeals to the supreme court of the Territory of Oklahoma from judgment rendered in said above entitled cause against this defendant on the 19 day of Oct., 1901.

HENRY M. FURMAN,
FORREST & LOWE, AND
MASSINGALE & AUXIER,
Attorneys for Defendant.

I hereby acknowledge service of this notice this — day of —— '02.

——— ———,
Co. Att'y of Washita Co.

I hereby acknowledge service of this notice this 17 day of March, 1902.

E. M. HEGLER,
Cl'k of Dist. Court for Washita County.

TERRITORY OF OKLAHOMA, } ss:
County of Washita, }

I received this writ on the 17th day of January, 1902, at 3:25 o'clock p. m. and served the same on the 17th day of January, 1902, by delivering a true copy of the same to T. A. Edwards, Co. att'y, personally, at 3:30 o'clock p. m.

JOHN W. MILLER,
Sheriff of Washita County, Oklahoma Territory.

Fees.

Service.....	$ .50
Copy.....	.15
Total.....	.65c.

271 Said notice is endorsed as follows: No. 1210. John T. New *vs.* Territory. Proof of service of notice of appeal. Filed March 18, 1902, Benj. F. Hegler, clerk supreme court. By Florence N. Weirick, deputy.

272 And afterward, on the 29th day of May, 1902, there was filed in said supreme court a motion to dismiss said cause, which motion reads in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } Motion to Dismiss.

Error from Washita county.

Comes now the defendant in error in the above entitled cause and asks the court to dismiss the appeal in the above entitled action for the reason that this court has no jurisdiction in this case in this, to-wit:

First. The plaintiff in error did not before filing his case-made in this court, serve upon the clerk of the district court and the county attorney representing the Territory, a notice of appeal as is for such cases by statute provided. That if any such notice of appeal was ever as a matter of fact, served upon the said district court clerk and county attorney, that it was at a period later than the time when the case-made was filed in the office of the clerk of this court.

Second. Plaintiff in error asks to dismiss this appeal for the reason that the record does not disclose that any notice of appeal was ever served upon the said clerk of the district court or upon the said county attorney of Washita county.

For which reasons defendant in error asks the court to dismiss this appeal.

T. A. EDWARDS AND
J. C. ROBBERTS,
Attorney General,
For Defendant in Error.

Filed May 29, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

273 *Suggestions and Authorities in Support of the Within Motion.*

The record must show affirmatively an exact compliance with statutory requirements as to giving and filing notice of appeal.

19 Kansas, 544. The State of Kansas *vs.* Samuel Ashmore—"Appeal in criminal cases. In the absence of any notice of appeal required by section 285 General Statutes 866, the supreme court has no jurisdiction to review the rulings and judgment of a district court in a criminal case."

The facts in the above case show that the alleged offence was committed in November, 1872, Ashmore was found guilty of murder in the first degree and was sentenced to suffer the penalty of death in 1875. On the 14th day of May, 1877, Ashmore, by his counsel, filed in this court a transcript of the record as appeal from such judgment and sentence. Said transcript was certified to by the clerk of the district court. The attorney general representing the State objected to any consideration of the case upon the ground that no notice of appeal appeared in the transcript. The section of the statute referred to is identical with the one which is now in force in Oklahoma. The court held in substance that it had no jurisdiction.

14 Kansas, 446. The facts of this case are best and most concisely shown by a short quotation from the opinion.

"Neitzel was convicted in the police court of the city of Concordia upon a charge of selling liquors without a license, and fined one dollar. He appealed to the district court, where he was again found

guilty, and sentenced to pay a like fine. This judgment he seeks to reverse in this court, and he has brought it here by case made, and petition in error; and the first point made is, that this is a criminal case, and can be brought to this court only by appeal, and by notice to the clerk and attorney. No notice appears in the record and it is well settled that notice to the clerk is essential to perfect the removal of a criminal case to this court for review."

274 People *vs.* Colon, (Cal.) 51 Pac. 1082. Syllabus:

"Where the transcript does not contain a copy of the notice of appeal and does not show that such notice was ever served on the adverse party, the appeal should be dismissed."

In the transcript presented in the supreme court in the above case, there was no notice of appeal set out and the only reference to any such notice was in the certificate of the clerk of the court below attached to the transcript in which he certifies "the foregoing to be a full, true and correct copy of the information," etc., "and also of the notice of appeal duly filed herein." Section 1240 of the Penal Code of California provides "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same and serving a copy thereof upon the attorney of the adverse party." The decision of the court was that inasmuch as this statute had not been complied with, that it had no jurisdiction in the matter and the appeal was consequently dismissed.

All of the authorities are at harmony to the effect that the notice of the appeal and service according to the requirements of the statute shall affirmatively appear in the record and that it would be improper to go *aliunde* for this notice or service. For this point we call attention of the court to the cases cited above, also to Adams *vs.* McPherson, 34 Pac. 1095, the syllabus of which is as follows:

"The record must affirmatively show the service of the notice of appeal on the adverse party or his attorney. Section 4808, Rev. St. 1887, is mandatory and the record must affirmatively show that its provisions have been complied with, to give this court jurisdiction."

The fact that the county attorney accepted service of the case made would not constitute a waiver of service of notice of appeal.—58 S. W. 1038.

275 The fact that the clerk certified to the case made would not relieve the plaintiff in error from serving him with notice of appeal and would not be considered a waiver.—51 Pac. 1082; 19 Kans. 544.

Sections 5330 and 5331 of the Revised Statutes of Oklahoma, 1893, provide in substance that technical errors in perfecting an appeal in criminal cases shall be disregarded. These statutes can have no application to a point of this sort for the reason that the question is jurisdictional, the notice of appeal being at the bottom of the right of this court to hear and determine the cause.

In addition to the cases cited above, I would like to call the attention of the court to some additional authorities upon these points.—

15 N. W. 605; 1 Kans. 331–314; 35 S. W. 27; 25 Pac. 1091; 45 Pac. 564; 42 Wis. 317; 44 Pac. 129; 65 N. W. 984; 63 N. W. 654; 51 N. W. 16.

Filed May 29, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

276 In the Supreme Court of the Territory of Oklahoma.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error. } Acceptance of Service of Motion.

We, the undersigned attorneys for the plaintiff in error in the above entitled cause, hereby accept service of notice of motion to dismiss, of which the within is a true copy.

Witness our hands this — day of —— A. D. 1902.

Served in time,

FORREST & LOWE,
Attorneys for Plaintiff in Error.

Filed May 29, 1902,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Said motion to dismiss is endorsed as follows:

1210—New *vs.* Territory—Motion to dismiss—Filed May 29, 1902, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

277 Afterward, on the second day of June, 1902, there *was* filed in said court in said cause, suggestions opposing motion to dismiss, which suggestions read in words and figures as follows, to-wit:

In the Supreme Court of the Territory of Oklahoma.

JAMES T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error.

Suggestions Opposing Motion to Dismiss.

The authorities cited by counsel for defendant in error in support of the motion to dismiss do not sustain their contention. These decisions, in so far as they bear upon the question are from Kansas

and Iowa, and the statutes of these two States differ in every material as to the manner and method of appealing from the district to the supreme court in criminal cases. In both these States the cases are taken up by appeal by a bill of exceptions properly allowed and signed.

Gen. Stat. of Kan., par. 5343, 1889, *et seq.* State against McClintock, 37 Kan. 39. State against Carr, 37 Kan. 421. Cases cited by defendant in error from N. W. Rep. are each and all from Iowa.

In these two States the title of the case of appeal is not changed, it remains the State as plaintiff and defendant below as defendant.

In the Territory a criminal case goes up upon a case made, par. 5324, whereby the status of the parties is reversed.

In Kansas and Iowa the bill of exception must be, both allowed and signed before the adjournment of the court in which the conviction was had.

278 In the Territory the party desiring the appeal has one year from the date of conviction, in which to file his appeal in supreme court. Par. 5321.

In the 19th Kansas cited by the attorney general no notice whatever was served, therefore no appeal was pending, the court did not obtain jurisdiction and the proceedings were properly dismissed. The same is true of the case cited from the 14th Kansas. In this case no attempt had been made to serve notice. The question was, whether a conviction for a violation of the city ordinance was a criminal action within the meaning of the crimes act relating to appeals. The court held that it was, and no notice of appeal having been given the court properly dismissed the proceedings.

In the case from California, 51st Pac., the record affirmatively shows that no notice had been served. The court had no jurisdiction and the case was properly dismissed.

The same is true of the Idaho case cited in the 34th Pac. This condition is true of every case cited by counsel for defendant in error.

If the facts of this case were the same as in the cases cited, no attempt to resist the motion would be made, but they are different. The records and files in the action at hearing affirmatively show that notice of appeal was served by the sheriff of Washita county on the county attorney of that county, and that the clerk of the court wherein the conviction was had accepted service of the notice of appeal. If this were not true it would be our contention that the plaintiff in error would yet have the right to perfect the records by giving notice, and that such notice would be a full compliance with the statutes, par. 5321. This contention is borne out by the case cited from Texas, 35 S. W. Rep. The court there say:

"On motion to permit a transcript to be filed, which does not contain notice of appeal, it cannot be presumed that the said notice was given, though the clerk of the court certifies that a motion
279 for a new trial was filed, and a docket entry states that the motion was denied, and the plaintiff appeals, particularly as

the motion was not accompanied by an affidavit stating that the notice was given."

"When a transcript does not contain a notice of appeal, the practice is to perfect the record in the court below, and correct the transcript in the appellate court by certiorari."

The statute is silent as to when the notice of appeal shall be served, par. 5322, while par. 5321 fixes the limit of one year for filing the transcript, which must be prepared as provided in par. 5324.

The statutes of some of the State provides the time within which the notice shall be given, not so in Oklahoma. The limit of time here, if there is a limit is one year, "after the rendition of the judgment,"—that is in which to file the case made. The case made may be filed at any time before the expiration of the one year and the notice of appeal can properly be served at any time after filing and within the year and the appeal is properly taken. A motion to dismiss ought not to be entertained until after the expiration of the year.

The notice of appeal is no part of the case made. It is no more necessary to attach it to the case made than it is a summons in error in a civil action. Both are jurisdictional and if the whole record shows the court to have jurisdiction the court will not dismiss.

The supreme court of Kansas in Shumaker vs. O'Brien, 19 Kan., 476, has fully defined a case made and what it should contain and clearly distinguished it from a bill of exceptions, and defined the latter.

1. "The office of a bill of exceptions, and of a case made is very dissimilar. The object of the former is generally to bring upon the record for review a decision of the court upon a matter of law, which the record would not otherwise show, and it must be reduced to writing, allowed, signed, and filed at the term the decision
280 complained of is made. After being signed, filed and made a part of the record of an action, it can be presented to the supreme court in the transcript of the case.

2. "The object of a case made is to present to the supreme court complete in itself, a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to bring to the notice of this court the errors complained of. It must embrace and include all that is necessary for a full understanding of the questions submitted for decision, regardless of the fact whether the exceptions are entered of record. It may be settled, signed, and filed beyond the trial term, and in vacation, upon the order and within the time allowed by the trial court or judge."

If reason, the decisions above referred to, the statute, par. 5322 do not settle this question in favor of the contention of the plaintiff in error, that the notice of appeal forms no part of the case made but that it is sufficient if it appears from the record that such notice was given, the question is forever put at rest by the decision of this court in 9th Okla. 462, Bailey vs. Territory, where this court says:

"An appeal is a right conferred by the organic act, but the matter of perfecting an appeal is a matter of statutory regulation. The criminal procedure act makes specific and definite provision for the mode of taking appeals in criminal causes. So far as appears from the record in this case, no effort has been made to comply with those statutory directions. An appeal by the defendant in a criminal cause is taken by the service of a notice upon the clerk of the court where judgment was entered, stating that the appellant appeals from the judgment, and by the service of a similar notice upon the county attorney.

The appeal is completed by filing a petition in error with a case made, or duly certified transcript of the judgment and proceedings in the cause, attached to such petition in error. In either case the notices served upon the clerk and county attorney, with proof
281 of service, should be filed with the record in this court, or duly authenticated copies filed in lieu thereof."

The cases cited from the Pac. Rep. are each and all of them to the same effect as the cases cited from Kansas and Iowa.

In 44 Pac. Rep. the court say: "Where the *record* fails to show that notice of appeal was given, the appeal will be dismissed."

The case cited in the 44 Pac. is to the same effect. There the court say: "But no bill of exceptions appears in the record, *and no service of notice of appeal was made* upon the plaintiff or his attorney."

In the case cited from 25 Pac. the court say: "The record of a case on appeal must affirmatively show that notice of appeal was filed with the clerk below, and served upon the adverse party or his attorney within the time required by the statute."

The record in the case at bar shows that these requirements of the statute necessary to confer jurisdiction have been complied with. The case cited from 1st Kansas is to the same effect. The Wisconsin case we have not had an opportunity to examine but feel that it must be and is in harmony with all the authorities, to the effect that notice of appeal must affirmatively appear somewhere in the record, and if it does it is sufficient. That it does in this case is beyond question. We might here suggest that Judge Strang, the predecessor of the attorney general, accepted services of the brief of the plaintiff in error and thus waived jurisdiction so far as it is in the power of the Territory to do.

The motion should be overruled for the following reasons:

First. It is not necessary or even proper to attach the notice of appeal to the case made. It forms no part of it.

Second. The defendant below having one year to file his transcript or case made has the same time under the statute to serve his notice of appeal.

282 Third. The record shows proper service and acknowledgment of notice of appeal.

H. M. FURMAN AND
FORREST & LOWE,
Attorneys for Plaintiff in Error.

Endorsed: 1210—John T. New, plaintiff in error, *vs.* Territory of Oklahoma, defendant in error—Suggestions opposing motion to dismiss—Filed June 2, 1902, Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

283 Afterward, at the June, 1902, term of said supreme court, on the third day of June, 1902, the following proceeding was had in said cause:

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } #1210.

Comes now R. B. Forrest and Henry Furman, of counsel for plaintiff in error, and J. C. Robberts, attorney general, for the Territory, and make oral argument herein. And cause is submitted, with fifteen days to the Territory for briefs.

284 And thereafter, at the June, 1902, term, of said supreme court, on the second day of September, 1902, the following proceeding was had in said cause, to-wit:

JOHN T. NEW, Plaintiff in Error,
vs.
THE TERRITORY OF OKLAHOMA, Defendant in Error. } #1210.

And now this cause comes on for final consideration by the court upon the record, oral argument and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error. To all of which plaintiff in error excepts.

Opinion by Pancoast, J. All the justices concurring, except Irwin, J., who presided in the trial of the cause below, not sitting, and Beauchamp, J., absent.

Which said opinion reads in words and figures as follows, to-wit:

285 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed September 2, 1902.

JOHN T. NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error. } No. 1210.

Syllabus.

1. *Murder—Justifiable Homicide—Instruction.*—On the trial of a cause, where the defendant is charged with murder, and the evidence of the prosecution tends to support the charge, and there is no evidence tending to support the lower crime of manslaughter, in either degree, but the evidence of the defendant tends to prove justifiable homicide it is not necessary for the court to instruct the jury upon the law of manslaughter, in either degree.
2. *Instructions—Should Run to Facts and All Proper Deductions and Interpretations of Them.*—The instructions in all cases should run to the facts, and to all proper deductions and interpretations of them, and not to questions not presented or covered by the evidence.
3. *Variance—Instruction Refused, Not Error.*—In a prosecution for murder, where the indictment charges the death to have been caused by a gunshot wound, and the evidence shows that the deceased was shot with a Winchester rifle, in the side of the face, the ball tending downward and coming out through the neck on the opposite side, penetrating and lodging in the shoulder, the gun from which the ball was shot having been held within a very short distance of the deceased at the time the shot was fired, and the evidence also shows that after the shot was fired the defendant struck the deceased over the head with the gun, crushing the skull, and where the only evidence that death was not caused from the gunshot wound, as alleged in the indictment, was that of a physician who testified, as an expert witness, that he could not tell whether death was caused by the gunshot wound or by the
286 blow on the head, but that either might have caused the death, it is not error for the court to refuse to give an instruction that if the jury, from the evidence, entertain a reasonable doubt as to whether the deceased died from the effects of the gunshot wound or from the effects of the blow on the head, that then it was their duty to acquit the defendant.

4. *Verdict Sustained by the Evidence—No Material Error on Trial.*—Where after an examination of the entire record, it appears that the defendant has had a fair and impartial trial, and that no material error has been committed by the trial court, and the verdict seems to be amply sustained by the evidence, this court will not disturb the verdict or judgment of the trial court.

Error from the district court of Washita county.—Clinton F. Irwin, trial judge.—Affirmed.

Henry M. Furman, Forrest & Lowe, Massingale & Auxier, and Culp, Giddings & Giddings, for plaintiff in error.

J. C. Robberts, attorney general, T. A. Edwards, county attorney, and J. W. Smith, for defendant in error.

The plaintiff in error, John T. New, was indicted by a grand jury of the district court of Washita county, on the charge of murder, and tried and convicted at the May, 1901, term, and sentenced to imprisonment at hard labor in the penitentiary for life. Exceptions were saved to certain rulings, a motion for a new trial filed and overruled, and the case brought to this court for review.

287 *Opinion of the Court by Pancoast, J.*

The errors assigned are grouped under three heads, and we will consider them in the order assigned in plaintiff's brief. First, error in neglecting to instruct the jury as to the different degrees included in the charge, murder and manslaughter. The question is squarely raised here whether it is necessary in all cases of trials for homicide to instruct the jury not only upon the question of murder, but also upon the question of manslaughter, whether the evidence does or does not tend to prove either of the degrees of manslaughter.

We think the law is definitely settled that where the evidence tends to prove only the higher, and does not tend to prove the lower, offense, it is not necessary for the court to give an instruction to the effect that the defendant may be found guilty of the lower offense Gatliff *v.* Territory, 2 Okla. 523; State *v.* Estepp (Kan.) 24 Pac. 986. And the rule is just as well settled, that where the evidence does tend to prove the lower offense, it is the duty of the court, when requested, to charge the jury as to the law of the lower offense which the evidence tends to prove:—Lawson *v.* Territory, 8 Okla. 1. The only question, then, is to determine which one of these two rules applies in this case.

By section 2078 of the Statutes of 1893, homicide is defined to be murder:

"When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being."

By section 2086 of the Statutes of 1893, homicide is made manslaughter in the first degree:

"When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

288 It is the province of the court to determine whether there is or is not any evidence which tends to prove the lower degree of crime, and when the court has determined that there is some evidence tending to prove the lower degree, then it is the duty of the court to instruct the jury, if requested, upon such lower degree. To apply the rule, we must consider the defendant's testimony, as upon this alone can there be any claim of manslaughter.

Just prior to the difficulty, the deceased, with one Walter A. Reeves, was traveling in a wagon along the public highway, going towards his residence. The defendant was at work fixing a wire fence at or near a gate, and also near the intersection of two public highways, or a "cross roads." The defendant states that he had taken his Winchester rifle to go down by a ravine or creek to shoot ducks, and, coming to the section line, near the road, he saw a steer out in the road, drove him in and proceeded to fix up the fence. As he was at work he saw the deceased and Reeves some distance away, in the road. They were in a wagon, sitting on chairs, and driving two loose horses ahead. That he kept on working, and looked up a second time when the deceased and Reeves were about forty or fifty yards distant. That at that time he saw Doyle, the deceased, reach his hand into his bosom and begin to jerk at something which the defendant says he supposed was a pistol. That he then, just reached down and picked up the Winchester and fired. That his wife had told him that the deceased had made threats, and said that if things kept coming the way they were that he was going to kill the defendant. That there had been some hard feelings between the two, but that they had never had any serious trouble. That he fired the first shot because he was afraid the deceased would kill him. That this fear was caused by the threats, and the fact that he saw the deceased reaching into his bosom. That as he fired the first shot, the deceased and Reeves jumped out of the wagon, on the opposite side. The defendant could only see their heads when he shot the second time. That he

289 kept along with the wagon for some distance, until the team ran away and passed him, when the two, deceased and Reeves, were in plain view, and the defendant then fired two or three more shots. That Doyle, the deceased, was working at his breast trying to get his pistol out. Reeves turned and ran west. That when Doyle had run to the distance of something like one hundred yards from the defendant, he, the defendant, quit shooting, and Doyle stopped running and turned and looked back, and commenced working at his breast again like he was trying to get his pistol out. The defendant then rested the gun on a post, took aim, and shot Doyle. Doyle kept running. The defendant

thought the last shot had struck the deceased, as he threw his hand down on to his leg. The deceased kept running, and got through the fence into the place of one Trotter, some distance away, and went into Trotter's house. The witness Trotter states that as Doyle came through the fence, he, the deceased, said "Do not let him kill me." New, the defendant, was then running down and along the fence, inside of his pasture. Doyle, still holding his leg, was running for the house. He did not stop. Trotter went out, to stop New as he was getting over the fence. He met the defendant in the road and said to him, "John, this will never do," and New said, "God damn you, turn me loose," and he jerked loose and followed Doyle. Trotter overtook the defendant at the house, and, assisted by his wife, again tried to stop him. Upon his promising that he would not shoot Doyle in the house, they let the defendant go. Doyle had gone into the house, and into an inner room. New went into the house and found Doyle sitting on the floor behind the door. He opened the door and shot him again, the shot taking effect in the side of the face, going through and coming out at the neck on the opposite side, and lodging in the shoulder. After the defendant fired this shot, he struck the deceased over the head with the gun.

The above includes the entire evidence of the defendant, covering the period of the difficulty. Where in it can we find any-
290 thing that tends to reduce the crime to manslaughter? The first of the three definitions of manslaughter in the first degree, as laid down in the statute, is where the homicide is "perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor." This paragraph cannot apply, because the defendant was not engaged in the commission of a misdemeanor, and it cannot possibly be said that there was no design to effect death.

The second paragraph of the law of manslaughter in the first degree, is where the homicide is "perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide." Neither can this provision apply, because it cannot be said that the homicide was perpetrated without a design to effect death. The evidence directly shows that there was a design to effect death.

The third paragraph of the section defining manslaughter in the first degree is where the homicide is "perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed." This is the provision of the law which the plaintiff in error claims applies in this case, and the one which it is claimed the court failed to cover by proper instruction. It will be noticed that the only testimony which it is claimed has a bearing on this subject, and makes this provision of the law of manslaughter applicable, is that of the defendant himself, that when he looked up and saw the deceased forty or fifty

yards distant, he was in the act of putting his hand inside of his clothing in a manner which made the defendant think he was
291 attempting to draw a revolver. Now, if the act of the deceased was sufficient to justify the defendant in this belief, in other words, if the act of the deceased was such as to make a reasonable man believe that he was in imminent danger of his life or great bodily harm, then there was sufficient justification for the defendant's act. But where is the element of unnecessary shooting? That is the principal element of this third subdivision of the law of manslaughter in the first degree. That is, the homicide must have been perpetrated unnecessarily. And of course the homicide must have been perpetrated not only unnecessarily, but without premeditation or design.

Where the evidence of the prosecution shows the killing to have been murder, and the evidence of the defendant tends to show the killing to have been justifiable, it is only necessary that the instructions of the court should cover the law of the case as shown by the evidence.—State *vs.* Hendricks, (Kan.) 4 Pac. 1050; People *v.* Lee Gam, (Cal.) 11 Pac. 183; Territory *v.* Baker, (N. M.) 13 Pac. 30; State *v.* Reed, 117 Mo. 604; State *v.* Fairlamb, 121 Mo. 138; State *v.* Kilgore, 70 Mo. 546.

The instructions in all cases should run to the facts and to all proper deductions and interpretations of them, and not to questions not presented or covered by the evidence. State *v.* Rhea, 25 Kan. 581;

Viewing the evidence of the defendant alone, from its most favorable standpoint, only one of two conclusions could have been arrived at by the jury. First, if the case for the prosecution was made out, the verdict must have been for murder. If the theory of the defendant was sustained, then the homicide was justifiable. As we view the defendant's testimony, from the record, however, taking it as a whole, and particularly the acts of the defendant from
292 the beginning of the shooting until the end, we do not see how the jury could have arrived at any other conclusion than that the defendant was guilty of murder, even if the acts of the defendant at the beginning of the shooting, separated from the latter part of the difficulty, could have been deemed justifiable, yet his following up the deceased, his deliberate shooting by laying his Winchester rifle across a fence post, and his continued following up and continued shooting at the deceased after he was wounded, and while he was fleeing and the vicious manner in which he spoke to Trotter when Trotter tried to persuade him to desist, the pursuing of the deceased into the inner room of the house, whence he had fled for safety, and the deliberate manner in which he entered the room and shot the deceased, all show a viciousness of mind for which there is not excuse whatever, and which must have impressed the court and jury with the fact of a premeditated design of the defendant to kill the deceased, and which cannot be held to tend to show that the homicide was perpetrated unnecessarily either while resisting an at-

tempt by the person killed to commit a crime, or after such attempt had failed.

In the case of Lawson *v.* Territory, 8 Okla. 1, cited by counsel, there was a personal difficulty between the defendant and the deceased at the immediate time of the homicide, of a character which made the question as to which was the aggressor a material one. Notwithstanding that, however, the court instructed the jury that there was no evidence to support or justify a verdict of manslaughter in the first or second degree or of excusable homicide, and that the verdict must be either for murder, as charged in the indictment, or that the homicide was justifiable, and the defendant was not guilty. In the case at bar there was no instruction upon this point. The instructions of the court simply covered the law of murder. Nor did the defendant ask for any instructions
293 covering the law of manslaughter to any degree. We think the plaintiff in error has not properly raised this question. If the defendant was entitled to instructions upon this point, he should have asked the court below to instruct the jury upon the law of manslaughter, and in the absence of such a request it was not error for the court to omit to give such instructions. It is true that the court should instruct the jury upon all material questions involved in the case, but when the court has covered the case with general instructions, it is not error to omit to instruct upon some particular branch of the case deemed advisable by the defendant under his theory of the case, when the defendant has not asked for such instruction.—Lovett *v.* State, 30 Fla. 102; Kelley *v.* People (Col.) 29 Pac. 805; State *v.* Estop, (Kan.) *supra;* State *vs.* Hendricks, 4 Pac. 1050.

The second error alleged is the refusal of the court to give instruction number 5, requested by the defendant. In arguing this proposition, counsel for plaintiff in error fall into a very grave error. They argue the question upon the theory that the testimony of Dr. James McLain was the only evidence offered upon the question as to what caused the death of the deceased. While it is true that this witness stated that he could not tell whether death was caused by the gunshot wound or from the blow on the top of the head, yet it does not follow that the jury could not have found from other evidence what caused the death of the deceased. Either of the two wounds was fatal. The gunshot wound was such that it did not require an expert to show its character or effect. The instruction asked was misleading, when applied to the evidence, and was properly refused.

294 We see no error in instruction number 15½ on page 228 of the record. It might be a question whether the instruction was necessary at all under the evidence of the case, and was evidently only given because of the statements of the defendant that he was afraid that the deceasad would kill him, and this instruction was given for the purpose of covering this branch of the case, so that the jury would not be misled in the event they believed that

the killing was done by reason of the cowardice of the defendant, or in other words, through fear that amounted to cowardice. It was evidently not given in order to have the jury understand that any degree of courage or cowardice on the part of the defendant could in any way influence the action of the jury in determining the guilt or innocence of the defendant. In fact, it was given for the very purpose of telling the jury that cowardice on the part of the accused should not influence their action.

This concludes the argument of all the errors assigned, although instruction number 17, as given by the court, is among the assignments. This instruction, however, is so manifestly correct, and is so applicable to the evidence of the case, that we cannot think counsel seriously question its correctness. There is no question but that the fatal shot was the one last fired, when the deceased was in the inner room of Trotter's house, where he had retreated from the defendant and was at the time making no demonstration, nor could he have been making any demonstration of which the defendant could have had any knowledge, because he was in an enclosed room, and the defendant could under no circumstances have believed at that time that the deceased was about to, or could, do him any bodily harm. Nor could he have believed that he was at the time in any immediate or apparent danger of death or bodily harm at the hands of the deceased, and to instruct that under such circumstances
295 the killing of a human being is not justifiable on the ground of self defense, is not error.

Instructions numbers eighteen and nineteen are along the same line, and were necessary to fully cover the proposition treated of. They were not only fully warranted by the evidence, but were warranted by the evidence of the defendant alone. By omitting them the court would have failed to cover the entire law of the case.

We have examined the entire record. The instructions were fair, and ample to cover all questions presented by the evidence. We see no error in the record, and, believing the accused to have had a fair and impartial trial, and that a correct verdict was arrived at, the judgment of the court below must be affirmed. All the justices concurring, except Irwin, J., who tried the case below, not sitting, and Beauchamp, J., absent.

296 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 295 pages, numbered from 1 to 295, inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the case of John T. New, plaintiff in error, *vs.* The Territory of Oklahoma, defendant in

error, as the same remain upon the files and records of said supreme court.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 6th day of October, 1903.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

297 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, between John T. New, plaintiff in error and The Territory of Oklahoma, defendant in error, a manifest error hath happened, to the great damage of the said John T. New as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States, the 24th day of February, in the year of our Lord one thousand nine hundred and four.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

298 [Endorsed:] I acknowledge service of a copy of this writ on me this 29th day of February 1904. Benj. F. Hegler, clerk of the supreme court of Territory of Oklahoma. And in compliance therewith I certify and transmit to the Supreme Court of the United States a complete copy of the record in case of John T. New, plaintiff in error, *vs.* The Territory of Oklahoma. Benj. F. Hegler, clerk of the supreme court.

299 UNITED STATES OF AMERICA, ss:

To the Territory of Oklahoma, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the Territory of Oklahoma wherein John T. New is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand nine hundred and four.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

300 On this 1st day of March, in the year of our Lord one thousand nine hundred and four, personally appeared before me, the subscriber, Charles E. Carpenter, sheriff of Logan county, Oklahoma Territory, and makes oath that he delivered a true copy of the within citation to Thompson B. Ferguson, as governor of the Territory of Oklahoma, on March 1st, 1904.

Sworn to and subscribed the 1st day of March, A. D. 1904.

[Seal Probate Judge, Logan County, Okla. Ter.]

C. A. GOODRICH,
Probate Judge.

[Endorsed:] No. —. John T. New, plaintiff in error, *vs.* The Territory of Oklahoma. Citation and proof of service. John J. Weed, attorney for pl't'ff in error.

301 In the Supreme Court of the United States.

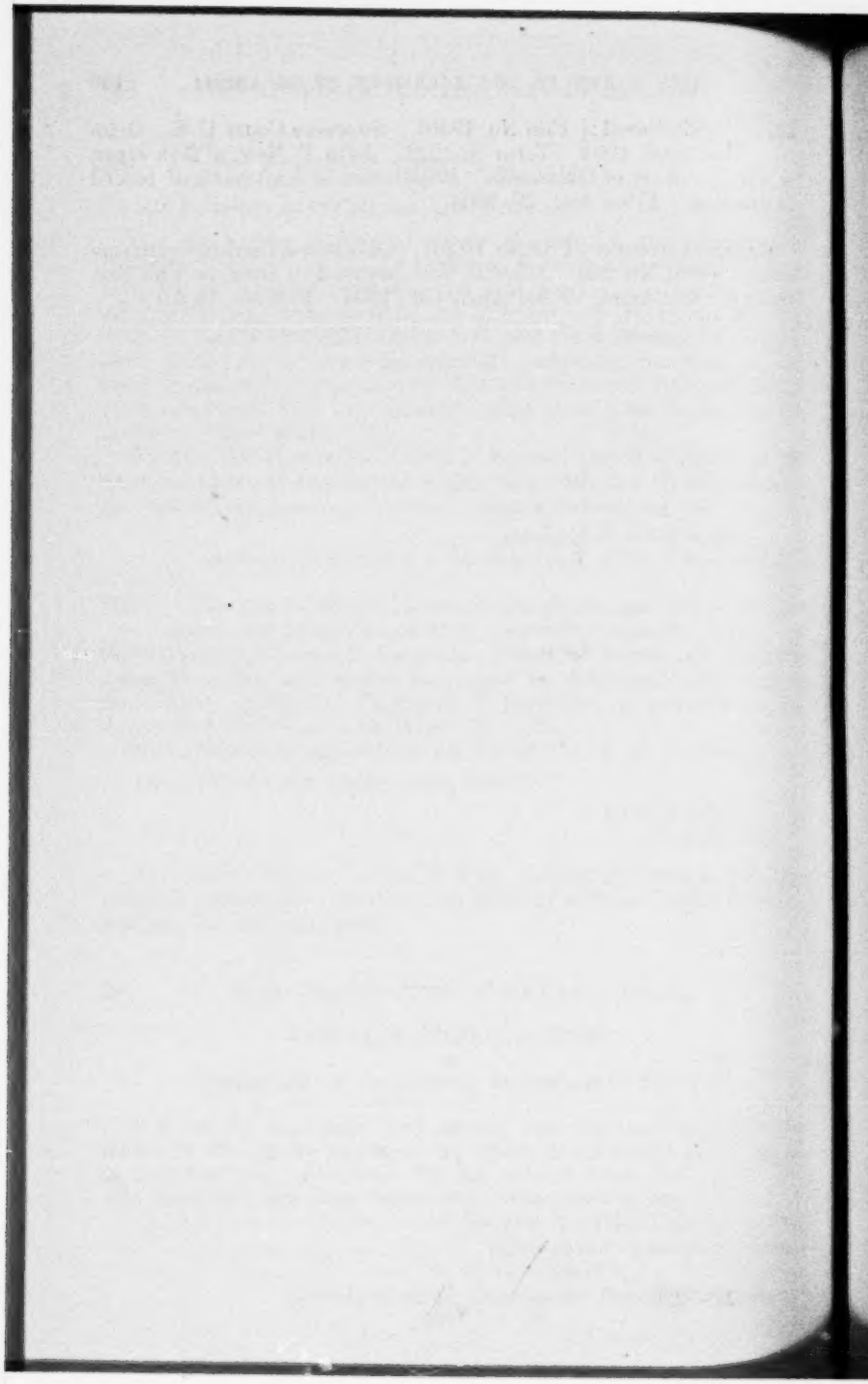
JOHN NEW, Plaintiff in Error,
vs.
TERRITORY OF OKLAHOMA, Defendant in Error.

It is hereby stipulated and agreed that pages 54 to 158 of the record in the above cause, which refers to the testimony of jurors on *voir dire*, may be omitted by the printer from the record and may be eliminated from the record in the above cause.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.
P. C. SIMONS,
Attorney General, Attorney for Defendant in Error.

302 [Endorsed:] File No. 19301. Supreme Court U. S. October term, 1904. Term No. 226. John T. New, pl'ff in error, vs. The Territory of Oklahoma. Stipulation to omit parts of record in printing. Filed Aug. 29, 1904.

Endorsed on cover: File No. 19,301. Oklahoma Territory supreme court. Term No. 226. John T. New, plaintiff in error, *vs.* The Territory of Oklahoma. Filed April 19", 1904. File No. 19,301.



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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903.

Office Supreme Court U. S.
FILED
MAY 2 1904
JAMES H. McKENNEY,
Clerk.

JOHN T. NEW, *Plaintiff in Error,*

vs.

THE TERRITORY OF OKLAHOMA,
Defendant in Error.

No. ~~650~~. 226.

MOTION TO ADVANCE.

The Plaintiff in Error, by John J. Weed, his Attorney, moves the court for an order advancing the above-entitled cause on the docket; and for such early hearing thereof as may be consistent with the other engagements and convenience of the court.

The questions involved are presented in the record certified to this court by appeal from the Supreme Court of the Territory of Oklahoma, and result from the instructions given and refused in the trial of the case of "The Territory of Oklahoma vs. John T. New," who was indicted, tried and convicted of murder in the Territorial District Court of the County of Washita in said Territory, at the term of said court held in May 1901, and sentenced to imprisonment at hard labor for life, and to be confined in the penitentiary at Lansing, Kansas, and the said Plaintiff in Error is there confined and serving said sentence.

The Plaintiff in Error, being the defendant in said criminal proceedings, by his attorneys objected to the rulings and decisions of the trial court as follows:

FIRST ASSIGNMENT OF ERROR.

The trial court erred in refusing to give in charge to the jury special instruction number five requested by the defendant, which refusal was at the time excepted to; which special instruction, as requested, was as follows;

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from

the effects of gunshot wounds, or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant;" which said requested instruction correctly stated the rule of law applicable to the evidence in the case and was demanded by said evidence.

SECOND ASSIGNMENT OF ERROR.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might, under the indictment, be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error, and error to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

THIRD ASSIGNMENT OF ERROR.

The trial court erred in giving to the jury the 19th section of the instructions to the jury, and in charging the jury as follows:

"The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that the defendant New could have withdrawn from the scene of the tragedy with safety, and could have gone away from the scene of action with safety to his life and person without committing the homicide described in evidence, as a matter of law it was his duty to have done so; and if he did not, and you further believe from the evidence, beyond a reasonable doubt, that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of said homicide, then your verdict should be guilty of murder." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and was erroneous in this:

First. It placed upon the defendant the duty, when threatened and approached in a threatening manner upon his own premises, to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of action upon the reasonable appearances of danger, viewed from his

standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and circumstances in evidence" before the jury.

FOURTH ASSIGNMENT OF ERROR.

The trial court erred in instructing the jury in section number 15½ of the instructions, as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well-grounded belief of danger to life or of great bodily harm, in the mind of an ordinary courageous man, the law will not justify the killing on the ground of self defense." To which instruction to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this: First, it does not state correctly the rule of law; and, second, it does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

FIFTH ASSIGNMENT OF ERROR.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased; the court in his instructions to the jury using the following language: "before the fatal shot was fired," thereby invading the province of the jury, whose duty it was, and not that of the trial judge, to determine the issue as to how the deceased came to his death and as to whether deceased came to his death in the manner charged in the indictment.

SIXTH ASSIGNMENT OF ERROR.

The trial court erred in refusing to give the jury, as the law of the case, the first special instruction requested by the defendant, as follows: Territory vs. New, No. 1. At the request of the defendant the court instructs the jury as follows:

"The jury are instructed as a matter of law that if a person believes, and has a reasonable cause to believe, that another

has sought him out for the purpose of killing him, or do him great bodily harm, and that he is prepared therefor w a deadly weapon, and the latter makes demonstrations ma festing an intention to commence an attack, then the per so threatened is not required to retreat, but he has a right stand and defend himself, and pursue his adversary (*if ne sary*), until he has secured himself from danger; and if, in doing, it is necessary, or it appears upon reasonable ground be necessary, to kill his antagonist, the killing is excusable the ground of self defense."

Modified by interlineation "(*if necessary*)" and giv Interlineation excepted to and complained of, in par theses, by defendant. C. F. I., Judge.

And the trial court further erred in modifying said first spe requested instruction by interlining the words in parenthe "if necessary," in said special instruction and giving the s to the jury, thereby wholly changing the meaning of requested instruction and depriving defendant of the l right to act upon reasonable appearances as viewed from standpoint; to all of which actions and rulings of the court defendant duly excepted at the time.

This motion is made under the authority of the twe sixth rule of this court, in order that there may be as speed hearing and determination of the errors assigned on the rec as justice may seem to require.

JOHN J. WEED,
Attorney for the Plaintiff in Er

The undersigned, on behalf of the Territory of Oklaho acknowledges the receipt of a copy of the above "Motion Advance," and consents to a hearing of said suit in Supreme Court at such time as that court may order and dir

Attorney for the United States
for the Territory of Oklaho

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, Plaintiff in Error,

vs.

THE TERRITORY OF OKLAHOMA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Appellant was convicted of murder in the District Court of Washita County, Oklahoma. He appealed to the Supreme Court of Oklahoma, and that court affirmed the judgment and sentence to a life term in the penitentiary, at its June term, 1902.

From the judgment of affirmance he has appealed to this court.

The questions to be decided on this appeal arise exclusively from the instructions of the trial court.

Plaintiff in error contends that the trial court committed fundamental error in failing to submit to the jury the law with reference to manslaughter, and in charging the jury that it was defendant's duty to retreat from his own premises in order to avoid the necessity of killing his assailant, and in other respects, as will more fully appear in the assignments of error which are copied in the brief. All of the instructions given by the court were duly excepted to. (See printed record, p 103.)

II.

The assignments of error are as follows:

FIRST ASSIGNMENT OF ERROR.

The trial court erred in refusing to give in charge to the jury special instructions number five requested by the defendant, which refusal was at the time excepted to and which special requested instruction was as follows:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gun shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant," which said requested instruction correctly stated the rule of law applicable to the evidence in the case, and was demanded by said evidence.

SECOND ASSIGNMENT OF ERROR.

The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might under the indictment be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter.

THIRD ASSIGNMENT OF ERROR.

The trial court erred in the nineteenth section of the instructions to the jury in charging the jury as follows:

"The jury is instructed that if from all the evidence, facts and circumstances in evidence in the case, you believe beyond a reasonable doubt that the defendant, New, could have withdrawn from the scene of the tragedy with safety, and could have gone away from the scene of action with safety to his life and person, and without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of said homicide then your verdict should be guilty of mur-

der." Which said erroneous charge was by the defendant duly excepted to at the time of its being given, and which said charge was erroneous in this:

First. It placed upon the defendant the duty, when threatened and approached in a threatening manner, upon his own premises, to retreat at the approach of his adversary.

Second. It deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint at the time, and weighed his actions by the actual danger he was then laboring under, viewed "from all the evidence, facts and circumstances in evidence" before the jury.

FOURTH ASSIGNMENT OF ERROR

The trial court erred in instructing the jury in section number fifteen and one-half of the instructions as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury sufficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm, in the mind of an ordinary courageous man, the law will not justify the killing on the ground of self defense," to which instructions to the jury the defendant duly excepted at the time of its delivery to the jury by the trial court, and the giving of which instruction was prejudicial to the defendant, and was erroneous in this:

First. It does not state correctly the rule of law, and

Second. It does not explain that the defendant might be guilty of manslaughter and might be convicted of manslaughter under the evidence in the case.

FIFTH ASSIGNMENT OF ERROR.

The trial court erred in assuming as a fact that the deceased came to his death from the defendant with a Winchester rifle shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of deceased, the court in his instructions to the jury using the following language, "at the same time the fatal shot in this cause was fired by the defendant," and also in said instruction using the following language, "before the fatal shot was fired," thereby invading the province of the jury, whose duty it was, and not that of the trial judge, to determine the issue as to how the deceased came to his death, and as to whether deceased came to his death in the manner charged in the indictment.

SIXTH ASSIGNMENT OF ERROR.

The trial court committed error in refusing to give the jury as the law of the case the first special instruction requested by the defendant, first special instruction requested by the defendant being as follows:

Territory
vs.
New. } No. 1.

At the request of the defendant, the court instructs the jury as follows:

The jury is instructed as a matter of law that if a person has a reasonable cause to believe that another has sought him out for the purpose of killing him or doing him great bodily harm, and that if he is prepared therefor with a deadly weapon, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has a right to stand and defend himself, and pursue his adversary (if necessary) until he has secured himself from danger, and if, in so doing, it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

Modified by interlineation ("if necessary") and given.

Interlineation excepted by defendant.—C. F. I., judge.

Interlineation complained of in parenthesis.

And the trial court further erred in modifying said first special requested instruction by interlining the words in parenthesis "if necessary" in said special instruction, and giving the same to the jury, thereby wholly changing the meaning of said requested instruction, and depriving defendant of the legal right to act upon reasonable appearances of danger as viewed from his standpoint, to all of which

action and rulings of the court the defendant duly excepted at the time.

John T. New,
Plaintiff in Error,
C. L. Herbert,
Culp & Giddings,
T. G. Chambers,
Attorneys for Plaintiff in Error.

Endorsed: No. 1210—John T. New, plaintiff in error, vs. The Territory of Oklahoma—Assignments of errors—Filed August 28, 1903—Benj. F. Hegler, clerk supreme court.

III.

The first point of law which we will discuss is raised by the third assignment of error appearing above, and attacks the eighteenth section of the instructions (printed record, p 98) wherein the jury was instructed in effect that the defendant's duty when attacked by deceased was to retreat, if possible, if he could thereby avoid the necessity of killing his assailant.

That charge is as follows, and is erroneously referred to as No. 19 in the assignments, but is really No. 18:

The jury is instructed that if from all the evidence, facts and circumstances in evidence in the case you believe beyond a reasonable doubt that defendant, New, could have withdrawn from the scene of the tragedy with safety and could have gone away

from the scene of action with safety to his life and person, without committing the homicide described in evidence, as a matter of law it was his duty to have done so, and if he did not, and if you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of life or person or habitation of said New, at the time of said homicide, then your verdict should be guilty of murder.

We attack this charge on two grounds:

First. The defendant being upon his own premises, and where he had a right to be, was not required to retreat, but could stand his ground when attacked, without in any manner impairing his right of self denfense.

Second. The charge completely stripped the defeudant of his right to act upon the appearances of danger, viewed from his standpoint at the time.

The evidence presented two theories, one testified to by the State's witness, Reeves, and the other by the defendant himself. According to Reeves' testimony, he and deceased were driving along the public road when they saw defendant at work on his farm repairing his fence. Reeves says that he knew there had been ill feeling between them, and he expected trouble between Doyle, the deceased, and the defendant. (See testimony of Reeves, pp 51 to 60.) The witness admitted that he himself had had trouble with defendant, and that they had "agreed to disagree" (p 59.)

When the witness and Doyle saw defendant at

his fence witness remarked, "Yonder is John now." Defendant looked up at them the first time and then proceeded with his work. When they got closer, according to this witness, defendant reached down and got his gun and began shooting at deceased. Doyle and witness jumped out of the wagon on the south side and witness ran south and deceased ran east, the defendant pursued deceased shooting at him several times.

The evidence for the prosecution also showed that after defendant had shot deceased once or twice he pursued him into the house of the witness, Trotter, where the deceased fell and defendant shot him again.

According to the testimony of the defendant there had been ill feeling between him and the deceased and Reeves for some time prior to the difficulty; threats made by deceased had been communicated to him. (See p 83) On the day of the homicide he was at work on his own land fixing his fence when he saw Reeves and deceased approaching in a wagon. When they got within a short distance deceased began pulling at his shirt to draw a pistol. Defendant picked up his gun and fired. Deceased jumped out and continued to try to get his pistol from his breast and defendant continued to fire. Deceased began to run, and when he got about one hundred yards from defendant, defendant ceased firing. Deceased began to work at his breast again and defendant shot again, and deceased ran into the house and defendant followed him in and shot him as he sat

behind the door, working at his breast still trying to get a pistol. (pp 84-85.)

Defendant proved by the justice of the peace and the sheriff (see testimony of Hampton, p 72, and Miller, p 73) that on the body of deceased was found a pistol, fastened to his vest with a safety pin, and it required several efforts or jerks to get it out.

Defendant also proved by Mr. Harper (p 73) that witness Reeves stated after the killing that they were all carrying guns for each other.

Also by Mr. Burroughs (pp 76-77) that Reeves told him: "We (Reeves and Doyle) was coming along the road and saw New, and he told Doyle 'yonder is that fellow now and you had better look out,' and Doyle began to get his pistol loose. It was pinned in the inside of his vest, and New went and got his gun and that he jumped and ran like hell, and Doyle kept on trying to get his gun until New shot one of his horses."

Defendant proved threats made by deceased and communicated to him. (See evidence of Tellford, p 78, 86; Harper, p 86; Howell, p 89; Powers, p 90; Ferris, p 91.)

It was admitted that defendant was on his own premises at the time.

With the record in this condition the trial court instructed the jury as shown in the third assignment, which instruction we will not copy again here in full, placing the duty upon defendant to retreat from his own premises at the approach of his adversary, who had threatened his life, in company with one of his open and avowed enemies.

This court condemned just such a charge as this in the case of Beard vs. United States, 158 U. S. 550. In that case Justice Harlan said:

"But the court below committed an error of a more serious character when it told the jury as in effect it did by different forms of expression, that if the deceased could have saved his own life and have avoided the taking of the life of Will Jones by retreating and getting out of the way of the latter as he advanced upon him, the law made it his duty to do so. And if he did not when it was within his power to do so without putting his own life or body in eminent peril, he was guilty of manslaughter.

"The court seemed to think that if the deceased advanced upon the accused in his own dwelling house * * * the case would be one of justifiable homicide. But we cannot argue that the accused was under any greater obligation, when on his own premises, near his dwelling house, to retreat or run away from his assailant than he would have been if attacked in his dwelling house. The accused being where he had a right to be, on his own premises, constituting a part of his residence and home, at the time deceased approached him in a threatening manner, and not having by language or conduct provoked the deceased to assault him, the question for the jury was whether without fleeing from his adversary, he had at the moment he struck deceased reasonable grounds to believe, etc."

The court then discusses the old doctrine of retreating to the wall and shows taht it has been practically abandoned by the courts entirely or so greatly

modified that it can no longer be given with safety to juries, citing from numerous authorities to sustain its position.

We confidently cite the court to that case and to the following authorities in addition, which conclusively show the error in the charge complained of here:

State vs. Hudspeth, 51 S. W. Rep. 488.
People vs. Newsomer, 118 Cal. 263.
Page vs. State, 40 N. E. Rep. 745.
LaRue vs. State, 41 S. W. Rep. 53.
State vs. Sherman, 18 Atlantic Rep. 1040.
State vs. Evans, 33 W. Va. Rep. 417.
Eversole vs. Conner, 26 S. W. Rep. 816.

The trial court in the "Beard" case was more merciful than the court who tried the case at bar, for he branded the man who refused to retreat as guilty of manslaughter only, while the court in this case said he was guilty of no less crime than murder.

We cannot reconcile the charge in this case with the authorities cited, and we decline to multiply the authorities, but submit that this charge, for the reasons stated, is reversible error.

IV.

We have quoted enough from the evidence to show the defendant's theory of the case, and we submit that the second assignment complaining of the failure to charge on manslaughter should also be sustained.

If the defendant told the truth, and he is entitled to have the jury decide that question, then we have a case where Doyle made an attempt to draw his pistol to kill defendant, but failed, and defendant shot in his necessary self defense. Thereafter Doyle having failed of his purpose retreated, and in fact defendant was no longer in danger, but nevertheless he pursued deceased, and while under the influence of fear or anger produced by the attempt upon his life, he slew deceased. Is this murder?

We submit not. In every jurisdiction that we know of the law makes allowances for sudden passion provoked by an adequate cause, it matters not whether it be fear or rage, so long as it is of such a character as renders the mind incapable of cool reflection. In all courts an attempt upon a man's life is held to be an adequate cause to create such passion as will reduce a killing, made under its influence, to manslaughter.

In Stevenson vs. U. S., 162 U. S. 320, it is held to be the bounden duty of the court to submit the issue of manslaughter when there is any evidence to raise the issue. This question is for the jury. As is said by the court in that case (p 320), "The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter. As we have already said, there may be a case of killing by shooting where the facts necessarily show malice, but taking all the evidence in this case we thiuk it was one for the jury to determine upon the issue of manslaughter."

Again the court says in the Stevenson case, after discussing the effect upon defendant's mind of deceased's prior conduct, as affecting the grade of homicide. "It seems to us quite plain that an assault upon another by means of firing a pistol at him is naturally calculated to excite some kind of passion in the one upon whom the assault is made. It might be of anger or it might be of terror. If either existed to a sufficient extent to render the mind of a person of ordinary temper incapable of cool reflection it might be plausibly claimed that the act which followed such an assault was not accompanied by the malice necessary to constitute the killing murder. Whether such a state of mind existed, and whether the plaintiff in error fired the shot under the influence of passion without malice cannot properly be regarded as a question of law."

This opinion by the Supreme Court of the United States but announces the law in all jurisdictions.

Nor do we think the law of Oklahoma is different than that laid down in the above decision.

By section 2086 of the statutes of 1893, homicide is made manslaughter in the first degree.

"When perpetrated unnecessarily, either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

The learned judge who wrote the opinion of the Supreme Court of Oklahoma in affirming this case quotes the above statute and then reviews the evidence which defendant relies on to show manslaugh-

ter and then concludes that there is no manslaughter in the case, and asks, "Where is the element of unnecessary shooting?" This question indicates that if this element can be found the court's ruling might be different. The learned judge in the latter part of his opinion answers the question himself, for he says: "There is no question but that the fatal shot was the last one fired, when deceased was in the inner room of Trotter's house, where he had retreated from the defendant, and was at the time making no demonstration, nor could he have been making any demonstration - - because he was in an enclosed room, and defendant could not have believed at the time that the deceased was about to or could do him any bodily harm." (See page 126, opinion of the court.

If the facts just quoted are true, is it possible to conceive a case in which the element of unnecessary shooting more clearly exists?

Here then we have a case made by the evidence where the deceased makes an attempt to shoot the defendant. He fails to get his pistol out, and beats a retreat. Defendant then pursues him, under the terror of rage produced by the attempt upon his life, and shoots him while retreating. The deceased runs into a house and falls behind a door and defendant, still under the influence of the passion, as is evidenced by his exclamation to Trotter when the latter tries to stop him, "God damn you, turn me loose!" (see opinion of court, page 123), goes into the room and fires fatal shot. Was not this an unnecessary shooting?

In order to judge defendant from his standpoint when he fired the "fatal" shot, you must take into consideration what has just preceded it and provoked it. You must remember the threats and the attempt to carry them into execution, and then the defendant's condition of mind becomes clear.

We submit that the killing under above circumstances comes clearly within the statute quoted, "When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

The Court of Criminal appeals of Texas in Tollett vs. State, 55 S. W. R., 575, applies the law to just such a state of facts when it says: "If deceased made an attack upon defendant, and such attack, viewed in the light of the previous difficulties and antecedent grudges, and the light of the surroundings at the time of the attack, caused defendant to believe from his standpoint that he was in danger of death or serious bodily harm, and if acting under such reasonable appearance he shot at deceased, and deceased after being shot or shot at, in good faith abandoned the attack, and defendant continued to fire at deceased as he retreated with full knowledge that there was no danger, and at the time his mind had been rendered incapable of cool reflection by the assault and circumstances of the former difficulty (by terror, rage or resentment), or by all such circumstances put together, appellant's mind was incapable of cool reflection, and thereupon he shot and killed deceased,

he would not be guilty of murder, and could not be guilty of any higher grade than manslaughter.

The learned judge who wrote the opinion in the case at bar in discussing this question (page 124 of Record) says, after stating defendant's theory of the facts: "Now, if the act of deceased was sufficient to justify defendant in this belief, in other words, if the act of deceased was such as to make a reasonable man believe he was in imminent danger, then there was sufficient justification for the defendant's act. But where is the element of unnecessary shooting?"

To this we reply that we are not discussing the question of justification, but of "mitigation." The learned judge fails to give the defendant the benefit of his mental condition at the time the "fatal shot" was fired, which was produced by the unlawful attack of deceased upon him, which is the crucial question, as is shown by the court in Stevenson vs. U. S. supra.

V.

The trial court in his instructions to the jury also lost sight of the important question of the condition of defendant's mind at the time the fatal shot was fired, as is apparent from the fourth assignment of error, which we will take up now, as it fits in very snugly at this time. This assignment assails the 15½ section of the instructions, which is as follows:

"The court instructs the jury that if a man kills another through mere cowardice, or under circumstances which are not in the opinion of the jury suf-

ficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm, in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self defense."

The giving of this charge only made more imperative the giving of a charge on manslaughter. Let us assume that if a man kills another through "mere cowardice" that the law will not "justify" it. Does it follow that such a killing is murder? Will not the law "mitigate" the offense if it is done through mere "cowardice?" If the killing is the result of cowardice merely, where is that express malice necessary to constitute murder?

And yet since no other degree is submitted to the jury than murder, they must necessarily have concluded that if plaintiff in error killed Doyle, while the latter was retreating when he was in no danger, simply because he was afraid, regardless of the condition of his mind or of the cause of it, he was guilty of murder.

That jury had only two alternatives, either an acquittal or murder. They might have believed all defendant swore, and yet not feel disposed to let him go free. Yet, if instructed properly that his fears, if produced by the acts of deceased, could be looked to for the purpose of mitigation, it is very likely that they would have been merciful, but they looked through His Honor's charge, and found no mercy there.

This charge is also erroneous because it leaves it to the opinion of the jury to say if there was any

reasonable appearance of danger sufficient to produce a well grounded belief of danger in the mind of an ordinarily courageous man, instead of judging him from his standpoint as he is, with his fears and apprehensions, acting from his own individual standpoint at the time.

Wharton Criminal Law (9th Edition Sec. 488) discusses fully this question and decides that the true test is not how the situation appears to "a reasonable man," but how did it appear to "the defendant himself." He cites various authorities and quotes (Sec. 490, foot note p 464) as follows. Following Judge King's lead, we find Judge Brewster, afterward presiding in the same court, declaring that "The attack must have been such as in the belief of the prisoner rendered it necessary to defend himself, even to the taking of the life of the deceased."

VI.

We also complain in the sixth assignment of the action of the court in refusing to give the following instruction:

"The jury are instructed as matter of law that if a person believes, and has a reasonable cause to believe, that another has sought him out for the purpose of killing him, or doing him great bodily harm, and that he is prepared therefor with a deadly weapon, and the latter makes demonstrations manifesting an intention to commence an attack, then the person threatened is not required to retreat, but he has a right to stand and defend himself, and pursue

his adversary (if necessary) until he has secured himself from danger, and if in so doing it is necessary, or it appears upon reasonable grounds to be necessary, to kill his antagonist, the killing is excusable on the ground of self defense."

The court modified this by adding "if necessary," as shown in the assignment. The right of defendant when attacked to pursue his assailant until he considers himself out of danger is especially important under the peculiar facts of this case, and it was a very grave error and prejudicial to him to limit his right of pursuit to actual necessity.

From what we have said and from the quotation from the Stevenson case we think it is perfectly clear that the evidence is ample to require the issue of manslaughter to be submitted to the jury. That there was evidence of manslaughter is apparent from the charge of the court itself, for in charge No. 17 (p 98 of record) the learned trial judge groups all the facts which we rely on to constitute manslaughter and tells the jury they constitute murder. This charge is as follows, and if the law takes any notice of the effect upon a man's mind by an attempt to take his life, this charge cannot be the law of Oklahoma or of any other jurisdiction:

"The jury are instructed that although they may believe from the evidence that before defendant, New, fired the first shot at the deceased that the deceased made some demonstration which indicated an intention on his part to draw a gun and that New at that time had reason to believe and did

believe that the deceased was about to draw a gun for the purpose of assaulting the defendant, and that said New at said time believed his life or his personal safety was in imminent danger, yet, if they further believe from the evidence beyond a reasonable doubt that before the fatal shot was fired the deceased had withdrawn from the scene of action, was fleeing from said New, and had retreated to a place of safety, and that said New followed the deceased after the real or apparent danger was over, and without any reasonable belief on the part of said New that his life or personal safety was in imminent danger, said New shot and killed deceased in manner and form as charged in the indictment, then said New is guilty of murder, and the jury should so find."

Yet the honorable and learned judge who wrote the opinion, holding that there was no manslaughter in this case asks "Where is the element of unnecessary killing?"

The above charge simply culls from the case the facts which constitute manslaughter and makes them murder, and declines to submit any other degree of homicide. Who blames the jury for saying it was murder?

When the law refuses to take into consideration the weaknesses that human flesh is heir to; when the law ceases to judge a man from his own standpoint, with his fears and passions aroused, then will a killing under the circumstances detailed in the above charge constitute murder and not before.

The facts grouped in the above charge by the court, which he says would constitute murder, simply make out a case where the homicide was "perpetrated unnecessarily while resisting an attempt by the person killed to commit a crime or after such attempt shall have failed," and which the Oklahoma statute declares to be manslaughter.

If there was any evidence of manslaughter the court should have charged upon it without being requested, as it was part of the law of the case.

Bishop New Criminal Law, Sec. 328.

Trabin vs. Conner, 67 S. W. Rep. 719.

VII.

We also complain of the refusal of the court to give defendant's request to charge as shown by the first assignment, which is as follows:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased; that is, if you are in doubt as to whether or not he died from the effects of gunshot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant."

The fifth assignment raises practically the same question for the charge of the trial court assumes that the deceased came to his death by being shot with a Winchester rifle and that deceased met his death by shooting. (See fifth assignment p 8 of Rec.) (See charge 15½-16, p 97-98.)

We submit that where it is doubtful whether deceased came to his death by shooting or by some other means, that the indictment should contain two counts so that it may cover either phase. But where, as in this case, the indictment only contains one count, and that charges a death by shooting, then it becomes incumbent upon the prosecution to establish this element as clearly and with the same precision required of it of the other elements. (Indictment page 17 of Record.)

Dr. McClain testified that he could not tell which injury caused the death. (See Record page 49.)

The learned Supreme Court of Oklahoma disposes of this question by saying, "While it is true that this witness (Dr. McClain) stated that he could not tell whether death was caused by the gunshot wound or from the blow on top of the head, yet it does not follow that the jury could not have found from other evidence what caused the death of deceased." (See opinion page 125.)

We respectfully submit that that does not meet our contention. While it is true "the jury may have so found," yet it was not submitted to them at all to find on this question, but the Court settled that question by constantly referring to the "firing of the fatal shot," etc.; "at the time the fatal shot was fired," etc. (See Tr. p 97-98.)

Wharton Criminal Law (9th ed.), Sec. 519-525, treats of this question, and it appears therefrom that when the indictment alleges the instrument that caused death, and it appears that the instrument

pleaded and instrument proved are of different nature and character, the variance is fatal.

Thus he says (Sec. 519): "Thus, evidence of a dagger will support the averment of a knife, though evidence of a knife will not support the averment of a pistol." And again at the close of Sec. 519 he says: "At common law proof of striking with a gun will not sustain the averment of shooting."

If it be said that the proof in this case showed both a shooting and a blow with a gun, either of which was fatal, and that the prosecution in the very nature of things could not state which caused the death, then we say that this situation could have been met by alleging both instruments in two separate counts, and then the two counts should have been submitted to the jury for them to find what was the cause of death. Such course was not pursued, but the judge assumed that the shooting was the cause.

In Wharton (supra) Sec. 525, he says that where the instrument is unknown the indictment should so aver, and in the note he cites the case of Comm vs. Martin, 125 Mass. 394, "where it was held that where the indictment charges defendant in one count with killing by means of a certain weapon and in another count with killing by means and weapons unknown and at the trial the killing is proved beyond a reasonable doubt, and there is no evidence of the particular means of death, the jury may convict on the latter count." And again he says at the end of Sec. 525, "But the instrument must be either specifically

defined or the want of such specification must be excused by the averment that the instrument was unknown."

While it may be true, upon the whole case, that this record fails to show a justifiable killing, yet, taking into consideration all the fact and circumstances, we think it manifest that it has been tried upon a wrong theory. We submit that manslaughter has been mistaken for murder, and defendant is now in the penitentiary under a life sentence, and that justice as well as well settled and established principles of law demands that the judgment of the lower Courts be reversed with instructions to grant defendant a new trial.

Respectfully submitted,

HUGH TAGGART,

CULP & GIDDINGS,

Attorneys for Defendant in Error.

Office Supreme Court U. S.
FILED
OCT 8 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, PLAINTIFF IN ERROR,

vs.

TERRITORY OF OKLAHOMA.

BRIEF FOR PLAINTIFF IN ERROR.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.

LAW REPORTER PRINT, WASHINGTON, D. C.

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BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

At the May term of the District Court of the Second Judicial District of the Territory of Oklahoma, an indictment for murder in one count was returned by the grand jury of Washita County, which charged that plaintiff in error—

> "On the thirteenth day of April, in the year one thousand nine hundred and one, in the county of Washita and Territory of Oklahoma aforesaid, did purposely, wilfully, and feloniously, with malice aforethought, and without authority of law, and with a premeditated design then existing in the mind of the said John New, to effect the death of H. F. Doyle, then and there with a certain Winchester rifle, loaded with gunpowder and certain leaden bullets, shoot a bullet into the body of him, the said H. F. Doyle, and so inflicted and so made a mortal wound upon and in the body of said H. F. Doyle, of which mortal wound so inflicted and so made, in the

manner and form and with the purpose aforesaid, the said H. F. Doyle, on the said 13th day of April, one thousand nine hundred and one, and in said county of Washita, did die, as was intended by the said John New as aforesaid he should do, and so the grand jurors aforesaid on their oaths aforesaid do say and find that the said John New, in manner and form aforesaid and by the means aforesaid, did then and there purposely, wilfully, and feloniously of his malice aforethought and without authority of law, and with the premeditated design to effect the death of him, the said H. F. Doyle, the said H. F. Doyle did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of Oklahoma" (Rec. pp. 16–17).

The indictment was signed by the county attorney; it was found, and the proceedings upon it in the trial court were had under laws enacted by the legislative assembly of the Territory (Compiled Statutes of Oklahoma, 1893).

The general charge of the trial court was given to the jury in the form of separate instructions, which were numbered. To nearly all of them the defendant excepted (Rec. pp. 93–99). He also excepted to instructions given at the request of the Territory (Rec. pp. 99–100), and to the modification by the court, before giving them of instructions 1, 3, 4, requested by him, and to the refusal of the court to give instruction 5, requested by him (Rec. pp. 93, 101, 102.)

The jury found the accused guilty of murder, and, under section 2085 of the compilation, fixed his punishment at imprisonment for life at hard labor (Rec. p. 105). The section provides that the punishment of every person convicted of murder shall be death or imprisonment for life, and requires the jury in the case of a verdict of guilty to designate in their verdict in which one of these ways the person convicted shall be punished.

A motion for a new trial was made by the defendant,

assigning as grounds therefor that the court erred in misdirecting the jury in matters of law; that the instructions tended to confuse the jury as to the law of the case; that the verdict was contrary to the law and to the evidence; that the court erred in giving certain instructions, part of its general charge; in giving instructions requested by the Territory; in modifying certain instructions requested by the defendant; and in refusing to give instruction 5, requested by the defendant. Other grounds were also assigned as follows:

> "Fourth. The court erred in failing to charge the jury that under the law it might convict the defendant of manslaughter in the first degree.
>
> "Fifth. The court erred in weighing the evidence in said trial and in taking from the jury the duty of determining in their verdict the degree of homicide, of which the defendant should be convicted, if of any degree.
>
> "Seventh. The court erred in failing to state in its instructions to the jury, the issues of fact submitted to the jury for its consideration" (Rec. pp. 106, 107).

The court overruled the motion for a new trial and the defendant excepted, and thereupon the court sentenced him to imprisonment for life at hard labor, to which "judgment and sentence" he also excepted (Rec. p. 108).

A motion in arrest of judgment was made by the defendant on the ground that the indictment "does not state facts sufficient to constitute a public offense" (Rec. p. 107).

The court took no action upon this motion, except such as was involved in the imposition of the sentence.

An appeal was taken to the Supreme Court of the Territory, pursuant to sections 4881 and 5318 of the Compiled Laws of the Territory; the judgment was affirmed by that court, and the present writ of error was sued out to review its action.

The Evidence at the Trial.

The record contains all the evidence adduced at the trial on behalf of the parties. As to the immediate circumstances of the difficulty which resulted in the death of Doyle, from its beginning to its conclusion, four witnesses only testified, viz: W. A. Reeves, also known as Dick Reeves, whose testimony was confined to the early part of it; G. B. Trotter and his wife, whose testimony was confined to the latter part of it, and New, the plaintiff in error.

Such parts of the evidence as are material to the questions involved may be summarized as follows:

The farms of New and Trotter were directly opposite each other, on a road running east and west, and New's gate was at the intersection of this road and the road running north and south, as indicated on the plat inserted between pages 70 and 71 of the record.

Reeves testified for the prosecution (Rec. pp. 51 to 61) that he and Doyle were returning from a place called Granite, 20 or 22 miles away; were in a wagon and Doyle was driving; as they approached New's place from the west, witness saw New at a distance of about 125 yards; thought he, New, was working on his fence; said to Doyle, "Yonder is John New now, working on his fence;" New looked toward them; they drove on; New looked a second time; while not expecting trouble himself, witness knew the two men were liable to have it from what he had "heard and seen;" New moved west along the fence ten or twelve steps; witness said to Doyle, "Henry, I am afraid you are going to have trouble this evening;" Doyle made no reply to anything witness said; New reached down, picked up his gun, and fired about as quick as he could; both jumped out of the wagon; Doyle had line in each hand; New fired again; witness ran west and then south; the team broke away from Doyle and the dust flew around Doyle once or twice at the crack of the gun; saw New put his gun on the fence and take deliberate aim at Doyle; saw Doyle "go down on his right

leg;" "seen" one or two more shots; Doyle went on going west toward Trotter's and New went in same direction on inside of his fence; Doyle and New disappeared going to Trotter's house; witness looked back as he, witness, was running.

The following questions were asked Reeves on cross-examination:

Q. Did you not tell him (W. J. Burrows) in Salyer (Texas), that you and Doyle were coming along the road and saw New and you said, "yonder is that fellow now, you had better look out," and then Doyle began to get his pistol loose; it was pinned in his inside vest pocket, and New went down and got his gun and began to shoot, and you jumped out and run like hell, and Doyle kept trying to get his gun out and hold his team?

A. No, sir (Rec. p. 59).

Q. Did you not say to him (Mr. Harper), "we were all carrying guns for each other, but I didn't think it would amount to anything; it would just be a bluff?"

A. I didn't say it (Rec. p. 59).

Q. I will ask you if you didn't go to Mr. Trotter's house, and in the presence of Charlie Trotter and the old gentleman, and your brother Solon was with you, if you did not go to Trotter's house and ask him if he ever heard New say anything about you or about you and Solon, and he said no, and you spoke up and said he had been talking about you, and you had a good notion to go up to his house and call him out and give him a beating?

A. I said that; I didn't say anything about beating him (Rec. pp. 59, 60).

Q. Did you not tell him (R. E. Tilford) in Port that you was going down to Combs and stay until the small pox scare was over at your place?

A. I don't remember it.

Q. Did you not tell him that you was going to raise a little hell; he asked you what, and you said, "you will hear of it," and you said, "I am going to run John New off," and he said, "John may not run," and you said, "I don't care a damn; I will run him off or kill him?"

A. No, sir; I never said that (Rec. p. 60).

G. E. Trotter testified for the prosecution (Rec. p. 36):

That Mr. Kites came to his house with a wagon and called for some hay that the witness let New have, and witness went to the hay stack to show him how to get in without running over some trees; heard some shooting commence west of his house; went back to house; saw Doyle's team coming by the house; saw Doyle and heard a gun fired and Doyle grabbed his right leg and went down on his right knee; he rose and went on; saw Doyle coming through the fence; Doyle said, "Don't let him kill me;" saw New running down the fence on the inside of his (New's) pasture; met New in the road and said to him, "This will never do;" he slung witness loose saying, "God damn you, turn me loose;" overtook him and witness' wife took hold of him, and they went in the room and witness' wife said, "Don't kill him;" New said, "Turn me loose and I won't;" witness expected them to go to shooting and he and his wife went out; after they got out heard a shot; saw New standing in the door; he took a horse out of the wagon, got on it and rode off. Mrs. Doyle and her daughter Gracie came up; found Doyle sitting in the house, his hands in his lap and his feet stretched out; saw wound, a hole in his jaw; witness knew nothing of the circumstances under which the shooting began (Rec. p. 45). The room that New and witness and his wife went into was a shed or back room; the room that Doyle was in was a room fourteen feet square.

Mrs. Trotter testified for the prosecution (Rec. p. 47) to the same state of facts as her husband.

Dr. James McLane, the only witness examined as to the cause of the death, testified for the prosecution (Rec. p. 49), that he saw Doyle after his death and made some examination of him. He was lying on a mattress; a bullet went in his left cheek and came out on the side of the neck and

went down in the top of the shoulder. There was another wound in the upper and back part of the thigh, coming out at the front side; and the skull was crushed in at the center; looked as if it had been struck by the gun barrel or something of the kind.

Q. What, in your opinion, caused the death of Mr. Doyle?

A. I can not tell you whether it was caused by one of the gunshot wounds or the stroke on the head. I I can not tell that.

Q. You can not tell which of the wounds caused his death?

A. No, sir.

Q. Is it your opinion that one of these wounds caused his death?

A. Yes, sir.

J. Lightfoot testified for the prosecution (Rec. p. 68) that he had heard shooting; met New in the road about 200 yards west of Mr. Trotter's house; said howdy, and asked what had occurred; what was the matter. New told him that he was out there at work on the fence, and Doyle and Reeves came down the road, and just before they got to him they reached for their guns, and New said he knew there had to be something done or was going to be something done; that he (New) stepped up to where his gun was and picked it up, and when they got pretty close to him "he just turned loose," and that he killed Doyle in Trotter's house.

Q. Anything else?

A. I said, "I am awful sorry;" and he said, "Yes, I am not sorry I done the work, but I am sorry I had it to do."

J. W. Miller testified for the prosecution (Rec. p. 70) that he was the sheriff of Washita County and arrested New in Greer County a week after the shooting, and that New was then sick.

Thomas J. Hampton testified for the defense (Rec. p. 71) that he was a justice of the peace and held an inquest over the body of H. F. Doyle; that he made an examination of the body and found a pistol in the inside pocket of his vest, on the right side; that it was fastened with a safety pin; that the point of the pin was unfastened and that the pistol was loaded. (By the Court: Take it out and let the sheriff empty it.)

The witness further testified that it required some effort to get the pistol out of the pocket; it seemed to be cankered and would not slip easily.

Mr. Harper testified for the defense (Rec. p. 73), that Reeves told him after the shooting that they were all carrying their guns for each other, but that he, Reeves, didn't think it would amount to anything; that it would be just a bluff.

Charlie Trotter testified for the defense (Rec. p. 74), that about nine months before the shooting, Reeves and his brother came to the place of witness' father, and in witness' presence asked his father if he had heard New say anything about them, to which his father replied no; and that Reeves said, "he has been talking about us," and that they were in a good notion to go there and call him out and beat him.

G. E. Trotter testified for the defense (Rec. p. 76), that Reeves and his brother came to his place before the killing, when his son was present, and asked if he (Trotter) had heard John New say anything about them, to which witness replied no, and they said he had been talking about them, and they had a notion to go up there and whip him.

Mr. Burrows testified for the defense (Rec. p. 76), that on the day of Doyle's funeral, in Salyer, Texas, Reeves said to him that he and Doyle were coming along the road and saw New, and he told Doyle, "Yonder is that fellow now; you had better look out," and that Doyle began to get his pistol loose; it was

pinned in the inside pocket of his vest, and New went and got his gun, and that he (Reeves) jumped out and run like hell, and that Doyle kept on trying to get his gun out until New shot one of his horses.

W. J. Tilford testified for the defense (Rec. p. 78), that he met Reeves on the morning before the killing of Doyle, and that Reeves said he was going to Combs until after the small pox scare was over, and that he was going to raise a little hell, and said witness would hear of it; he said he was going to run John New off, and witness said, "maybe John won't run," and he said, "if he don't I will kill him." The witness further testified (Rec. p. 86), that about the first of March he met Doyle, about a half mile east of Combs, and Doyle asked where witness had been, and witness replied, "down to New's." Doyle said, "I want to ask you one question: did you ever hear him say anything about me?" Witness replied, "no." Doyle said, "he does talk about me, and I will stop it; if I ever get him in the right place, some powder will burn."

W. F. Tharp testified for the defense (Rec. p. 86) that he was at Doyle's house about May 1, 1900, and that Doyle said that he and New had had some trouble and had had a trial. Doyle said he could not get justice in the courts and was going to take the thing in his own hands, and was going to revenge himself; and that Doyle then showed a large blue-looking pistol, and said he had got it to revenge himself with and to protect himself with; he was talking about John New and he said that he carried the pistol everywhere he went; he said that he and New had had some trouble in a field, and that he, Doyle, then had his pistol in his boot leg, an unhandy place, and he could not get it out or he would have killed him that day. Saw Doyle after that, and Doyle asked if witness had a place yet; witness replied that he had not. Doyle said he knew where witness could contest and get one; that he could contest New and get his place. Witness told

Doyle he had better drop the trouble; but Doyle said he would not do it, it had gone too far; Doyle said he had intended to kill New ever since he accused his (Doyle's) brother Jim of stealing a horse in Collin County some time before.

John W. Howell testified for the defense (Rec. p. 88) that he was at Doyle's house in August, 1900; stopped with him one night; was looking over the country for a place, and asked Doyle for information in regard to where he could find a place, and told him about the amount he had to pay for it; Doyle said he could tell him of a claim that would "beat buying one;" Doyle spoke of some difficulty and said that he regretted that he didn't kill him (evidently referring to New) at that time, and Doyle said if the same opportunity was afforded again he would do it.

W. A. Powers testified for the defense (Rec. p. 90) that he met Doyle in April, 1900; that witness asked him if he was still at outs with New and said to him that he had better drop it, but Doyle said no; he would kill him first; that witness communicated this to New and told him to watch Doyle, that he might kill him, that he appeared to be pretty mad at him.

Mr. McCarthy testified for the defense (Rec. p. 90) that he had heard Doyle say that he would kill New before the year was out, and that this was in July or August, 1900.

John Ferris testified for the defense (Rec. p. 91) that some time in May, 1900, he was at Doyle's house with Tharp, and that Doyle said he had tried the court, justice of the peace, and had failed to get justice; that Doyle showed them a black-handled pistol in his vest pocket and said he was going to kill New. He said that New had intimated that his (Doyle's) brother had stolen some horses and that he (Doyle) had made up his mind to kill him ever

since he made that statement; that witness had seen Doyle several times with a shot gun, and that once Doyle told him it was loaded with buck shot.

C. W. Tharp testified for the defense (Rec. p. 79), that he had lived a neighbor of New's in Collin County for ten years, and that his reputation as a quiet, peaceable, law-abiding citizen generally was good.

Mr. Brown testified for the defense (Rec. p. 79), that he had known New for twenty years, and that his general reputation for being a law-abiding, quiet, peaceable citizen had always been good.

Wylie Williams testified for the defense (Rec. p. 80), that he had known New for nearly three years; that his general reputation as a peaceable, inoffensive, law-abiding citizen had been good.

Mr. Mumsey testified for the defense (Rec. p. 81), that he had known New for twenty years, and that his general reputation as a peaceable, inoffensive, law-abiding citizen was good so far as he had ever heard.

Dr. Clay testified for the defense (Rec. p. 81), that he had known New for fourteen or fifteen years, and that his general reputation in the community for being a quiet, peaceable, inoffensive, law-abiding citizen was good.

John Perkins testified for the defense (Rec. p. 82), that he had known New all the latter's life, nearly twenty-seven years; for five years had been his next door neighbor; that New's general reputation as a quiet, peaceable, law-abiding citizen was as good as that of any person in the county.

New, the plaintiff in error, testified in his own behalf (Rec. p. 82), that he never had any serious trouble in his life with any man except Doyle; that he had

been sick with the grip and then with the measles, and had been out only about three days; thought he would go and kill some ducks; didn't succeed in killing any; had had some boys working on his fence; they had not got it quite finished; had put his gun down and was working on the fence himself when he looked up and saw Doyle and Reeves coming; he kept on working and looked up the second time; at this time they were within about forty or fifty yards; saw Doyle reach in his bosom and begin to jerk at something, he, New, supposed to be a pistol; reached down and picked up the Winchester and fired; had been told of threats made at different times by Doyle, and Mr. Powers had told him that Doyle had said that if things kept coming the way they were he was going to kill him, New; fired because he was afraid Doyle would kill him; Doyle had threatened to do so, and Doyle reached into his bosom and he was afraid Doyle would kill him; at the first shot Doyle and Reeves jumped out of the wagon on the opposite side, and he, New, shot the second time; after the team passed, Doyle was in plain view, working at his breast trying to get his pistol out and he, New, shot again; Reeves had turned and run back; witness quit shooting when Doyle was about a hundred yards away; Doyle then checked up, turned and looked back, and commenced working at his breast again like he was trying to get his pistol out; witness then laid his gun on a post and shot him; thought he hit him; Doyle throwed his hand on his leg; witness followed him to the house because he was afraid Doyle would turn and shoot him; Doyle was not out of shooting distance; he promised Mrs. Trotter not to go into the house because he was afraid Doyle would shoot through the door or out of the door and kill witness while they were holding him. When he went into the room Doyle was on the floor still working at his breast; he then shot Doyle, and struck him with the gun in the head, and turned and walked out; took one of his horses from the team that had gone down for a load of hay and rode off; went away for safety because Reeves and his brother and his father were all enemies

and witness was afraid they would come up home and kill him, or witness would have to kill some of them.

Assignments of Error.

1.

The court erred in holding that instruction 15½ in the general charge of the trial court, given to the jury of its own motion (Rec. p. 97), correctly stated the law applicable to the evidence and was properly given.

2.

The court erred in holding that instruction 16 in said general charge (Rec. pp. 97–98) correctly stated the law applicable to the evidence and was properly given.

3.

The court erred in holding that instruction 17 in said general charge (Rec. p. 98) correctly stated the law applicable to the evidence and was properly given.

4.

The court erred in holding that instruction 18 in said general charge (Rec. p. 98) correctly stated the law applicable to the evidence and was properly given.

5.

The court erred in holding that instruction 19 in said general charge (Rec. p. 98) correctly stated the law applicable to the evidence and was properly given.

6.

The court erred in holding that instruction 2 of the instructions requested by the Territory (Rec. p. 100) correctly stated the law applicable to the evidence and was properly given to the jury by the trial court.

7.

The court erred in holding that instruction 3 of the instructions requested by the Territory (Rec. p. 100) correctly stated the law applicable to the evidence and was properly given to the jury by the trial court.

8.

The court erred in holding that instruction 4 of the instructions requested by the Territory (Rec. p. 100) correctly stated the law applicable to the evidence and was properly given to the jury.

9.

The court erred in holding that the refusal of the trial court to give instruction 1 of the instructions requested by the defendant (Rec. p. 101) was proper, and that said instruction, as modified by the trial court and given to the jury, correctly stated the law applicable to the evidence.

10.

The court erred in holding that the refusal of the trial court to give instruction 3 (Rec. pp. 101, 102) of the instructions requested by the defendant was proper, and that said instruction, as modified by the trial court and given to the jury, correctly stated the law applicable to the evidence.

11.

The court erred in holding that the refusal of the trial court to give instruction 4 of the instructions requested

by the defendant (Rec. p. 102) was proper, and that said instruction as modified by the trial court and given to the jury was a correct statement of the law applicable to the evidence.

12.

The court erred in holding that instruction 5 of the instructions requested by the defendant (Rec. p. 93) was not a correct statement of the law applicable to the evidence, and that the refusal of the trial court to give it was proper.

13.

The court erred in holding that there was not sufficient evidence in the case tending to prove a lower grade of offense than murder, and that the trial court properly confined its instructions to the jury to the question of murder or self-defense.

14.

The court erred in holding that under the evidence it was not the duty of the trial court to instruct the jury as to manslaughter and to advise them that they might convict or acquit the defendant of murder or convict him of manslaughter as they might find the facts to be.

15.

The court erred in holding that even if there was evidence in the case tending to prove a lower grade of crime than that of murder, and the fact was apparent to the trial court, nevertheless it was not the duty of the trial court to instruct the jury upon such lower grade, unless requested by the defendant to do so.

16.

The court erred in holding that the motion of plaintiff in error for a new trial was properly overruled and a new trial refused by the trial court.

17.

The court erred in holding upon an examination by it of the entire record that the instructions given were fair and ample to properly cover all questions presented by the evidence, and that the accused had a fair and impartial trial.

18.

The court erred in affirming the judgment of the trial, court, and in not reversing it and remanding the case to the trial court with instructions to grant a new trial.

ARGUMENT.

The argument will be addressed to the establishment of the following propositions:

1. The trial court should have granted instruction 5 requested by the defendant, because of the failure of the proof to show that the death was caused by a gun shot wound as charged in the indictment, and not by a blow on the head.

2. Upon the trial court's theory of the case, that under the evidence one issue of fact only, murder or self-defense, was presented for the consideration of the jury, the instructions were erroneous and misleading as to the law of self-defense.

3. An instruction as to manslaughter would have been proper under the evidence, and it was the duty of the trial court to have given it, of its own motion, in the absence of a request by the defendant to do so.

4. Even if not bound, without such request, to have given such instruction, it was the duty of the trial court under the laws of the Territory, when the prejudicial omission was called to its attention by the motion for a new trial, to have granted the motion.

5. The trial court was without jurisdiction to try the case.

It is obvious that the establishment of either of these propositions necessitates a reversal, as involving error prejudicial to the defendant.

1. Failure to Prove Charge as Laid.

The trial court refused to grant instruction 5 of the instructions requested by the defendant, and the refusal is the basis of the 12th assignment of error. The instruction reads as follows (Rec. p. 93):

> "You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gunshot wounds or from the effects of injuries inflicted by a blow on the head by some deadly instrument, then it is your duty to acquit the defendant."

Dr. James McClane, a witness called by the prosecution, was the only witness by whom it was sought to prove the immediate cause of death. He testified (Rec. pp. 50, 51), that he was a physician; that he examined the dead body of Doyle on the day he was killed; that he found a wound caused by a bullet which entered the left cheek and came out on the side of the neck, and another wound in the upper and back part of thigh which came out on the front side, and that the head of the deceased was crushed in at the center as if he had been struck by a gun barrel or something of the kind, and that as to the death of Doyle, *he could not tell whether it was caused from one of the gun-shot wounds or the stroke on the head*, and that in his opinion *one* of these wounds caused his death.

There was other testimony in the case as to these wounds, but no part of it bears upon the question whether the death was caused by one of the bullet wounds or by the blow on the head, or by both, a matter which it was for the jury alone to determine. There was absolutely no fact proved in

the case to justify even an inference by the jury that the death was caused by one of the gun shot wounds. The testimony of New was that the first shot was followed immediately by the blow on the head, and, if inference was allowable at all, it would have been more reasonable to attribute the death to the blow on the head than to either of the gun shot wounds, neither of which was in a place necessarily fatal.

In the predicament of the evidence, or of lack of evidence, the jury could not, if left to themselves, have found beyond a reasonable doubt that the death was due to one of the gun shot wounds. The trial court, however, did not leave the matter to them; it settled it for them; in instruction 17 of the general charge (Rec. p. 98), the court says, "If the jury believe from the evidence, beyond a reasonable doubt, that at the time the *fatal shot* in this case was fired," etc.; and in instruction 18 of the general charge (Rec. p. 98) the court, after referring to the *first* shot, uses the language, "Yet if they (the jury) further believe beyond a reasonable doubt that *before the fatal shot was fired, etc.*;" the "fatal shot" is also referred to in instruction 15½. It may be stated at this point that instruction 15½, which is the basis of the first assignment of error; instruction 17, which is the basis of the third assignment, and instruction 18, which is the basis of the fourth assignment, were erroneous as invading the exclusive province of the jury, in the respect mentioned. They were also erroneous in other respects, as will be hereinafter shown.

The instruction requested should have been given. It was clearly a case of not proved as to the charge laid. The rule is that the deceased must have died the same kind of death as is alleged in the indictment. The proof of the killing must be of the same species as that charged.

In Guedel *vs.* People, 43 Illinois, 227, the question under consideration was the same as the one presented here, that is to say, whether under an indictment for murder by shooting from a gun by means of powder and shot the State

could be permitted to prove a murder committed by striking the deceased with a gun upon the head. It was held it could not, as the proof did not agree with the allegation, in substance and general character. The court say:

> "The rule in regard to questions of this character is stated by Greenleaf with his customary precision as follows: 'An indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description' (1 Greenleaf, section 65). In his third volume, section 140, he again says: 'It is sufficient if the proof agrees with the allegation in substance and generic character without precise conformity in every particular. Thus, if the allegation be that the death was caused by stabbing with a dagger, and the proof, etc., of killing by any other sharp instrument; but if it is alleged that the death was caused by a blow with a club or by a particular kind of poison or by a particular kind of suffocation and the proof be by killing of blow given by stone or any other substance or by a different kind of poison or another manner of suffocation, it is sufficient; if, as Lord Coke observes, the offense agrees with the effect of the indictment the variance in substance is not material, but if the evidence be of death in a manner essentially different from that alleged, as if the allegation be of stabbing or shooting and the evidence be of death by poisoning or the allegation be of death by blows inflicted by the prisoner, and the proof be that the deceased was knocked down by him and killed by falling on a stone, the indictment is not supported.' We have consulted many of the text writers on this subject and the same rule in substance, with similar illustrations, is laid down by them all."
>
> . . . . . .

The case of Anderson *vs.* The United States, 170 U. S. 490, is not in conflict with that of Guedel. The indictment alleged the murder to have been caused by shooting and drowning. This court held that the charge involved no inconsistency, and sustained the conviction although it did

not clearly appear from the evidence that death was due to one or the other or both causes. The court quotes from the opinion of Chief Justice Shaw in Commonwealth *vs.* Webster, 5 Cush, 295, as follows:

> "Take the instance of a murder at sea, a man is struck down, lies sometime on the deck insensible, and in that condition is thrown overboard; the evidence proves the certainty of a homicide by a blow or by drowning, but leaves it uncertain which. That would be a fit case for several counts charging death by blow, death by drowning, and perhaps a count charging death by both combined."

The court in its opinion also cites Com. *vs.* Desmarteau, 16 Gray, 1, in which one count of the indictment charged that the death was caused by blows, another by drowning, and the third by both, and the conviction sustained; also Com. *vs.* Macloon, 101 Mass. 1, in which it was held sufficient to allege in the indictment that the death was caused by a wound, exposure, or a starving, and it was held to be sufficient to prove that it resulted from all or any of them.

The following cases, in which a conviction was sustained, were also cited:

Joy *vs.* the State, 14 Ind. 139, where the indictment charged a death caused by holding a child in the flames, vapor, and steam until fatal injuries were inflicted. The second count charged that the fatal injuries were inflicted by blows, and the third count alleged that the death was caused by both of said causes.

Woodford *vs.* People, where the indictment charged the burning of a number of designated dwelling houses, and it was held that although the fact that the houses did not burn at the same time and that but one was set on fire, communicating therefrom to the others did not make the burning of each a separate offense.

State *vs.* Fox, 25 N. J. L. 566–601, where the indictment charged that the injuries causing death resulted from cut-

ting the throat of the deceased with a knife or a razor' it was in evidence by the testimony of a physician that there were mortal wounds in the throat of the deceased which must have been made with a sharp instrument, such as a knife or razor, from their appearance, and that the "cut was clean and not jagged;" there was also evidence as to other and different kinds of wounds. Objection was made that the State was permitted to prove a killing by other means than those described in the indictment, but the court held that the objection was not sustained in point of fact by the record; that the State having sustained the charge of the indictment by proof of the injury as therein alleged, it was competent to show the nature and extent of the injuries inflicted on the deceased.

State *vs.* Johnson, 10 La. Ann. 457, where the indictment contained two counts, one alleging death by beating and the other by drowning, and it was sought to compel the State to elect between the two counts, and the refusal of the court below to require such election was sustained, as the various modes were properly charged in different counts.

People *vs.* Colt, 3 Hill, where the indictment contained a count charging the striking and cutting deceased with a hatchet as the cause of death, and another count charging it to have been occasioned by striking him and cutting him with an instrument to the jurors unknown. The evidence tended to prove the death to have been caused from the discharge of a pistol. All the wounds found upon his person (Rec. p. 304) were such as might have been produced by a hatchet, except a small but apparently mortal one found on the side of the head. The conviction was sustained.

Jones *vs.* Georgia, 65 Ga. 621, where the indictment contained two counts, one for murder by strangulation and the other by burning. The body bore marks both of burning and strangulation.

Rogers *vs.* State, 50 Ala. 102, where the indictment

charged the killing by cutting off the head with a knife and by cutting off the head with an axe. The evidence tended strongly to establish the fact that the deceased had been killed in one of these modes. The conviction was sustained under the State code, and the rule laid down (1 Greenleaf Ev., section 165) that "If the proof agree with the allegation in substance and general character without precise conformity in every particular" it is sufficient. It was held that the charge of the court was not, under the particular circumstances of the case such a departure from the rule as to vitiate the charge and make it erroneous.

Gonzales *vs.* State, 5 Tex. App. 590, where the indictment charged, in one count, the infliction of a mortal wound with a pistol, and that the accused set fire to and burned the clothes of the deceased and thereby mortally burned him, and that of said mortal wounds he died.

It will be observed that in each of these cases there was a charge in the indictment which covered the cause of death as shown by the proof, in which respect they are different from the case at bar, where the charge of the cause of death is confined to a bullet wound from a gun. The county attorney and the grand jury had before them the two possible causes of death and might have laid a proper foundation, under the decisions, for proof tending to show a death caused in one or the other way, or in both. They elected to charge in one way only. The proof fails to support the cause of death as charged, beyond a reasonable doubt, and the failure is fatal.

2. The Instructions as to the Law of Self-defense Were Erroneous and Misleading.

The instructions presented to the jury but a single issue, that of murder or a killing in self-defense, and they were restricted to its consideration. Plaintiff in error contends that even upon the court's theory of the case the instructions of the court were erroneous and misleading.

The particular instructions to be considered in this connection are instruction 15½ of the general charge, upon which the first assignment of error is based; instruction 16 of the charge, upon which the second assignment is based; instruction 17 of the charge, upon which the third assignment is based; instruction 18 of the charge, upon which the fourth assignment is based; instruction 19 of the charge, upon which the fifth assignment is based; instructions 2, 3, and 4, given at the request of the Territory, upon which, respectively, the 6th, 7th, and 8th assignments are based; instructions 1, 3, and 4, requested by the defendant, with their modifications by the court, and upon which, respectively, the 9th, 10th, and 11th assignments are based.

Instruction 15½ (Rec. p. 97) announces two separate and distinct propositions, viz:

1. That if a man kills another through "*mere cowardice*" the law will not justify the killing on the ground of self-defense.

2. That if a man kills another "under circumstances which *are not in the opinion of the jury* sufficient to induce a well-grounded belief of danger of life or of great bodily harm in the mind of *an ordinarily courageous man*," the law will not justify the killing on the ground of self-defense.

By the first of these propositions the court imposed upon the jury the duty of determining whether the defendant would have acted differently, under the circumstances disclosed by the evidence, had he not been timid to the degree of cowardice, and of settling the matter of his justification in killing for or against him according to the conclusion which they might reach.

The jury were left to reconcile their differing individual standards of judgment as best they might, and to determine the purely speculative question without any fixed and definite rule for their guidance. Having reached a

conclusion adverse to the defendant on the question, nothing was left for the jury to do, under the instruction, but to find the defendant guilty. The jury if they had been permitted to do so might have found that the defendant, notwithstanding his timidity, was a reasonable man and that he acted in good faith upon what seemed to him to be a reasonable appearance of danger, although the jury did not from their standpoint believe that there was in fact such reasonable appearance of danger.

The same idea pervades both propositions, and there is no foundation for it in reason or authority. Neither courage nor cowardice is the standard by which the justification of the slayer is to be determined; he is to be judged as a *reasonable* man, whether he possesses or is lacking in courage (as the term may be understood by different men), and no matter to what degree; upon the question of justification, whether he was blessed in the one way or afflicted in the other, is immaterial; a man may be timid to the degree of cowardice and yet be a *reasonable* man.

The "ideal man" (who of course would be courageous) is not to be set up by the court "as the standard by which appearances are to be measured or the belief tested" in such cases.

> "There is not, of course, to be any inquiry as to whether he (the slayer) was a brave man or a coward, nor any kindred matters to be investigated."
>
> Batten *vs.* State, 80 Ind. 404.

The Indiana court, in considering in another case the question whether actual fear of great bodily harm without reasonable cause for it would excuse a killing, say that—

> "the criminal law holds sane men responsible for the ordinary exercise of their reason. It is a power common alike to cowards and those who know no fear. It is a guide to which both may apply if they wish to do so."
>
> Creek *vs.* State, 24 Ind. 153.

The Supreme Court of Georgia, in treating the same subject, say:

> "As to all these requests which were based upon the idea that the circumstances which attended the killing were such as to excite the fears of a drunkard or a coward or even of Mr. Golden, the law makes no discrimination. They must be such as to excite the fears of a *reasonable* man."
>
> Golden *vs.* State, 25 Ga. 533.

But while the fears of a timid man irrationally excited will not justify a killing, committed under a belief due to them of the necessity of such killing, to save the slayer from death or great bodily harm, such belief will reduce the killing to manslaughter, because it excludes the idea of malice.

The jury in the case at bar, as it was given to them by the court, were precluded from finding manslaughter.

The second part of the instruction is also objectionable in that it required the jury in reaching an opinion as to whether the circumstances were sufficient to induce "a well-grounded belief," to consider them from their own standpoint and not from that of the defendant.

In Batten *vs.* State, *supra*, numerous authorities are cited (Rec. p. 405) showing the settled doctrine to be that:

> "The guilt of the prisoner must depend upon the circumstances as they appear to him."

And see R. R. Co. v Jopes 120 U. S. 23-4.

Instruction 16 (Rec. p. 97) is divisible into two separate and distinct parts; the first is objectionable because the standpoint of the jury is substituted for that of the defendant in determining the existence of evidence "to justify" the defendant's fears and to justify the slaying as necessary. The second part is objectionable in ignoring the portion of the difficulty between the defendant and the deceased which took place before the last shot was fired, and its effect upon the defendant; and, again, in

requiring the jury in ascertaining grounds "for a reasonable belief" in the mind of the defendant *at the time* of the killing to determine the matter from their own standpoint and not from that of the defendant.

Instruction 17 (Rec. p. 98) is objectionable for the reason that the questions submitted are to be determined from the standpoint of the jury and not that of defendant.

Instruction 18 (Rec. p. 98) is objectionable upon the ground that while implying a belief on the part of New, at the time he fired the last shot, that his life or personal safety was in danger, it left the jury to determine whether it was reasonable or not from their own standpoint, and not from his.

Instruction 19 (Rec. p. 98) is in contravention of the decisions of this court. The undisputed evidence showed that the defendant was on his own premises, not far from his residence; that he was there for no evil purpose, and that he was engaged in the lawful occupation of fixing his fence, which bordered upon a public road; defendant's testimony was to the effect that while thus engaged the deceased and another, both his enemies, came along the road; that there had been ill feeling between the parties; that the deceased had made threats against his, New's, life which had been communicated to him; these threats, which were of the most violent kind and indicated the vindictive character of the feeling of the deceased towards New, were fully proved at the trial; that when near to him (New) the deceased put his hand to his breast and began jerking at his vest, as if endeavoring to get out what defendant supposed to be a pistol; that from the actions of deceased and the threats previously made by him, he, New, believed his life was in danger and fired at deceased under this belief; that in moving along the road the deceased kept up the effort to get his pistol out, and that he was endeavoring to get it out when New fired the last shot.

A loaded pistol was found in the vest pocket of the

deceased, in the removal of which even then some difficulty was experienced, owing to the manner in which it was fastened to the vest, facts which were strongly corroborative of New's testimony.

In Beard *vs.* United States, 180 U. S. 356–361, this court in a review of the authorities on the duty to retreat, quotes with approval the following from Runyan *vs.* State, 57 Ind. 80:

> "The weight of modern authority in our judgment establishes the doctrine, that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may without retreating repel force by force, and if in the reasonable exercise of his right of self-defense his assailant is killed he is justifiable."

The court also quotes with approval the following from East's Pleas of the Crown:

> "A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony such as murder, rape, robbery, burglary and the like, upon either. In such cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing it is called justifiable self-defense."

The defendant under the evidence in his case was entitled to have the law as announced in case of Beard given to the jury by the court; as the law was actually given to the jury they were told that if in their opinion New could have withdrawn with safety to his life and person it was his duty to do so. In other words, if the jury should find that New might have fled with safety it was his duty to have fled, and to have done this no matter what his own reasonable belief as to the matter might be.

Instruction 2, granted at the request of the Territory

(Rec. p. 100), is clumsily expressed and calculated to mislead the jury; they are substantially if not in terms told that "murder" would be justified, if the person killed had made threats and at the time the "offense" was committed manifested by some act done an intention to execute them. The instruction was misleading as conveying the idea that every killing of a human being was "murder;" and again the instruction left it to the jury to determine from their own standpoint and not from that of the accused the sufficiency of the manifestation, as an indication of an intention to execute the threats.

This instruction and others excepted to were wanting as this court said in dealing with those in the case of Guorko *vs.* United States, 153 U. S. 190, "in the clearness that was required in order that the jury might not misapprehend the principle of law by which they were to be controlled."

Instruction 3, granted at the request of the Territory (Rec. p. 100), informs the jury that a person is permitted by law to defend himself from threatened injury to his person and is justified "in using all necessary and reasonable force to defend himself but no more than the circumstances reasonably *indicate* to be necessary." "Indicate" to whom and from what standpoint, that of the jury or that of the defendant? That of the jury was evidently intended, and the jury might well so have inferred.

Instruction 4, granted at the request of the Territory (Rec. p. 100), like every other instruction given in the case, relates to the justification of the defendant upon the ground of self-defense. It is objectionable in this, that it placed the question whether the deceased was in "terrified flight" before the jury, as one to be determined by them without regard to the impression made upon the mind of the defendant by the circumstances as they appeared to him, or his bona fide belief induced by them.

It is also objectionable in making the question of justification depend not upon the bona fide belief of the defendant

as to his danger and as to the reasonableness of the belief situated as he was, but upon the question to be determined by the jury whether the defendant had been "in pursuit of the retreating human being, *for such a time that he has time*, as a reasonable human being, to know that the person killed is in flight and not in fight," thus making a mere evidential circumstance, from which the absence of such bona fide belief might be inferred, the controlling factor in the determination of guilt or innocence of the crime charged, instead of defendant's actual belief.

If the defendant ought to have realized the fact that danger was past, but did not owing to his own fright, terror, anger, or heat of passion induced by the conduct of deceased and other circumstances in evidence, he could at most be properly convicted of manslaughter.

The giving of instruction 1, requested by the defendant (Rec. p. 101), as modified by the court was erroneous.

New had the right under the law to act upon appearances which reasonably indicated to him, situated as he was, that he was in danger of life or of severe bodily harm at the hands of the deceased, although in fact he was in no actual danger of either. Under the instruction as modified by the court, his justification is made to depend upon the evidence of actual danger, and of actual necessity for the killing by reason of it.

Hurd *vs.* People, 25 Mich. 425

In giving instruction 3, requested by the defendant, as modified, the court advised the jury that if they found from the evidence that the accused had threatened to kill the defendant and that the threats had been communicated to the defendant, and that the deceased did some act just prior to and at the time of the killing, which indicated to the defendant an intention on the part of the deceased to execute such threats, the defendant would be justified in taking the life of the deceased, but " this would not justify the

defendant in pursuing the deceased and killing him after the real or apparent danger was past."

The instruction as a whole was improper and prejudicial to the defendant; it assumed as a fact that there was pursuit in an objectionable sense and a killing by the defendant "after the real or apparent danger was past," and if this was not meant it still left it to the jury to determine from their own standpoint and not from that of the defendant and without regard to what might have been his reasonable belief, situated as he was, whether such danger was in fact past or not.

Instruction 4, requested by the defendant, as modified and given by the court (Rec. p. 102), by the addition of the words in parenthesis at the end of it, is erroneous.

The instruction, as requested, advised the jury that if they found from the evidence the defendant believed he was in danger of death or serious bodily harm from the deceased, and that such belief was based upon reasonable evidence of danger, and that he made the fatal assault while acting under such belief, they should acquit him, although, in fact, he was not in actual danger; and that they should acquit him if *they entertained a reasonable doubt upon the evidence* that the defendant actually believed he was in such danger.

By the qualification the matter of reasonable doubt was eliminated, and the instruction when considered in connection with instruction 4, granted at the request of the Territory, made defendant's acquittal dependent upon the actual and not apparent necessity of the killing.

3. The Trial Court Should Have Instructed as to Manslaughter Although Not Requested To Do So by Defendant.

All the authorities are to the effect that in a trial for murder it is error for the trial judge not to submit the question to the jury *when requested*, if the evidence tends to show the lower degree of crime.

In Stevenson *vs.* United States, 162 U. S. 313, this court said (Rec. p. 315), in speaking of the action of the trial court:

> "The ruling of the learned judge was to the effect that in this case the killing was either murder or else it was done in the course of self defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility, and tendency of the evidence and decided, as a matter of law, what, it seems to us, would generally be regarded as a question of fact, viz, whether under all the circumstances which the jury might from the evidence find existed in the case the defendant was guilty of murder or whether he killed the deceased not in self defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self defense, and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law, and against the defendant;"

and (p. 316):

> "If there were some appreciable evidence upon that subject, its proper weight and credibility were for the jury."

The court (p. 315) emphasizes this view by saying:

> "The evidence might appear to the court to be simply overwhelming to show that the killing was, in fact, murder and not manslaughter, or an act performed in self defense, and yet so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury and can not be matter of law for the court."

In Lawson *vs.* Territory, 8 Ok. 1, under an indictment for murder, the trial court instructed the jury that they must find either murder or justifiable homicide, and—

> "that in this case there is no evidence to support or

justify a verdict of manslaughter in the first degree, manslaughter in the second degree, or excusable homicide."

This was held to be error on the facts of the case, the Supreme Court of the Territory saying:

> "There was some evidence from which the jury might have said that the defendant was only guilty of one of the degrees of manslaughter. All of the facts were before the jury and it was their province to say whether the homicide was premeditated with the design to effect the death of the deceased, or by means of a dangerous weapon, or unnecessarily while resisting an attempt by the deceased to commit a crime. The trial court seems to have proceeded upon the theory that after the homicide was proved beyond a reasonable doubt to have been committed by the defendant, it was the duty of the defendant to introduce evidence to show that it was only manslaughter.
>
> "This is true in our Territory by virtue of our statutes, section 5227; . . . but notwithstanding the statutory provision, who is to determine when the defendant has proven sufficient circumstances in mitigation that will reduce the killing to manslaughter? If any evidence is introduced which tends to reduce the killing to manslaughter, it is a matter for the jury to determine whether it is murder or manslaughter. The views herein expressed are supported by numerous and very able authorities."

The defendant could not waive the not doing of an act, essential under the law, in his prosecution:

> "The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty can not be dispensed with or affected by the consent of the deceased, much less by his

mere failure, when on trial or in custody to object to unauthorized methods."

Hopt *vs.* Utah, 110 U. S. 579.
Lewis *vs.* U. S. 146 U. S. 374.

The defendant in this case was denied absolutely the benefit of this doctrine, in the trial court and in the appellate court.

The following provisions of the Criminal Code of Oklahoma are pertinent in this connection, as showing what the law made "essential" in the proceedings against New:

"Section 1838. No act shall be deemed criminal or punishable except as provided or authorized by this code."

"Sec. 1844. The punishments inflicted by this code can be inflicted only upon a legal conviction in a court having jurisdiction."

To the same effect is section 4861.

"Sec. 1845. Whenever a crime is distinguishable into degrees, the jury, if they convict the prisoner, shall find the degree of crime of which he is guilty."

"Sec. 1847. The several sections of this code which declare certain crimes to be punishable devolve a duty on the court authorized to pass sentences to determine and impose the punishment prescribed."

"Sec. 5132. The plea of not guilty puts in issue every material allegation in the indictment."

"Sec. 5133. All matters of fact tending to establish a defence other than that specified in the third subdivision of section 5127 (former acquittal or conviction) may be given in evidence."

"Sec. 5202. When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lower of such degrees only."

"Sec. 5247. When a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

"Sec. 5248. The jury may find the defendant

guilty of any offense the commission of which is included in that with which the defendant is charged in the indictment or of an attempt to commit the offense."

"Sec. 5227. Upon a trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable."

"Sec. 5146. Issues of fact must be tried by a jury."

"Sec. 5197. The court must decide all questions of law which arise in the course of the trial."

"Sec. 5230. In charging the jury the court must state to them all matters of law which it thinks necessary for their information in giving their verdict," etc.

"Sec. 5318. An appeal to the Supreme Court may be taken by the defendant as matter of right from any judgment against him, and upon the appeal any decision of the court made in the progress of the case may be reviewed."

"Sec. 5267. Exceptions may be taken by either party to the decision of a court or judge upon a matter of law. First. In granting or refusing a motion in arrest of judgment. Second. In granting or refusing a motion for a new trial."

Section 5258 provides that in a criminal prosecution by indictment exceptions may be taken to the decision of the court—

"On any question of law not a matter of discretion, or in charging or instructing the jury on the trial of the issue or any other matter prejudicial to the rights of the defendant."

If a killing in self-defense was not made out at the trial of the plaintiff in error, the fact that there was evidence in it which tended strongly to show the lower grade of offense admits of no question.

In Collins *vs.* United States, 150 U. S. 62, the defendant was indicted for murder; the killing took place under the following circumstances: At a dance, a boy, a half brother of the defendant, was attending a soda-pop or confectionery stand; the deceased, who was quite drunk, took a bottle of soda-pop, and refused to pay for it; some words passed between deceased and the boy and deceased slapped the boy with his open hand; the boy ran away and deceased followed him; seeing the controversy, the defendant left his place in the dance and went after his pistol, and after getting it came near to the deceased and without a word shot him and he sunk to the floor. The defendant then turned and walked away but in a few minutes returned, and, seeing the wounded man on the floor said, "I have pretty near killed him, I might as well finish him," and then put the pistol close to the head of the deceased and fired a second time. After this, defendant walked off and fled from Ft. Gibson, where the shooting had taken place.

It was held by the court that:

> "The facts of this case presented a proper question for the consideration of the jury as to whether the homicide was murder or manslaughter."

See also Bird *vs.* United States, 180 U. S. 361.

The case of Potter *vs.* State, 85 Tenn. 97, is directly in point as to the contention of plaintiff in error, that it was the duty of the court to have charged the jury as to manslaughter, although not in terms requested to do so.

In that case there were threats and acts of deceased tending to excite apprehension in the mind of the defendant, and the court held that the omission to charge the jury in respect of this aspect of the case was "as fatal an error as it would have been to have charged it incorrectly."

The verdict, say the court—

> "can not negative the existence of a defense the jury was not properly instructed to consider, and we are not satisfied to hold that the facts sustain a ver-

dict which is not the result of the deliberate judgment of the jury after a full, fair, and proper exposition of the law in a case involving the life of the citizen or his hopeless consignment to servitude and infamy. In such case this court would not stand upon any too nice technicality of requiring the defendant to have demanded any instruction essential to a fair trial, which the law is supposed to guarantee to him without a demand, in order that he should be entitled to it.

"It is the duty of the circuit judge to charge the law applicable to the evidence, and give the defendant the benefit (1 Lea, 293) of it, and not to decide for himself the case he supposes to be made out, and apply the law to such suppositious case and leave to the jury only that for decision, and to us to speculate on its effect and the possible injury or want of injury done the defendant."

The views of the Tennessee court are in harmony with the views of this court in the case of Hopt *vs.* State and Lewis *vs.* State, *supra*; the views of the Supreme Court of the Territory in New's case are not.

The latter court say (Rec. p. 122), in passing upon the case of New:

"It is in the province of the court to determine whether there is or is not any evidence which tends to prove the lower degree of crime, *and where the court has determined that there is some evidence tending to prove the lower degree, then it is the duty of the court to instruct the jury, if requested, upon such lower degree.*"

The court then recites the facts and upon the recital holds that there was no evidence tending to prove a lesser grade of offence than that charged (Rec. pp. 122–124). That the conclusion was erroneous is obvious upon the face of the recital. This action of the court was in contravention of the decisions of this court above cited and of the previous decision of the court itself in Lawson *vs.* Oklahoma, 8 Ok. 1,

in which heat of passion was held to be sufficient under proper circumstances to reduce a killing to manslaughter.

The court said in the case:

> "Section 2086 of our statutes provides that 'homicide is manslaughter in the first degree. . . . Third, where perpetrated unnecessarily, either while resisting an attempt by the person killed to commit a crime or after such attempt shall have failed.' There was some evidence from which the jury might have said that the defendant was only guilty of one of the degrees of manslaughter."

The only one of the contingencies mentioned in section 2078 of moment here, under which a homicide is declared to be murder, is the following:

> "First. When perpetrated without authority of law and with a premeditated design to effect the death of the person killed."

The word "premeditated" as thus used does not indicate anything different from the "malice aforethought" of the common law when applied to express intent to take life. A "premeditated design to effect death" simply means express malice.

> 1 McClain's Crim. Law, sec. 358.
> State *vs.* Dale, 108 Mo.
> People *vs.* Enoch, 13 Wend. 159.

Hence, section 2078 does not include cases where the killing is unlawful, but intentional, and is done in terror, unreasonably excited, or in heat of passion, for which there was reasonable provocation, and which would have been manslaughter at common law, because of the absence of malice.

By section 2086, which is to be considered in connection with section 2078, homicide is manslaughter in the first degree in three cases, in two of which the homicide is per-

petrated "without a design to effect death." The third is stated in the quotation from Lawson, above.

This section could not have been intended, as might be inferred from the naked import of the language used, to reduce a homicide from murder to manslaughter, merely because the deceased was attempting to commit some offense, where the slayer knew the killing was unnecessary, and much less after the attempt had failed, as he knew. It can only be given a sensible construction by the application of the common law doctrine of manslaughter, of killing in the heat of passion.

This is apparently recognized by the Supreme Court of the Territory in the case of Lawson, *supra*, where it is held that "heat of passion" may reduce a charge of murder. The county attorney and the grand jury seem to have taken this view by putting in terms the question of malice in issue through the averments of the indictment which charge "a wilful, malicious, and felonious" killing.

Furthermore, section 3874 of the statutes of the Territory (1893) puts in force the common law as modified by constitutional law, statutory law, judicial decisions, and the conditions and wants of the people, and section 4870 requires the "proceedings, practice, and pleading" to be in accordance with the common law, in criminal actions or matters of a criminal nature, where not specifically provided for by the statute. By section 9 of the organic act it is provided that the territorial courts—

> "shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property."

The common law must therefore be the rule when other rules are lacking.

4. Calling the Attention of the Trial Court by the Motion for a New Trial to the Prejudicial Omission to Instruct as to Manslaughter Was Timely Under the Territorial Laws, and the Motion Should Have Been Granted.

Section 5267 of the Oklahoma statutes (1893) provides that an exception may be taken to the overruling of a motion for a new trial. The motion made in this case assigned as one of its grounds that the trial court erred in failing to charge the jury as to manslaughter (Rec. p. 106); and the exception taken to the overruling of the motion made this action of the court a matter for review, under sections 5318 and 5330 of the territorial laws.

If there was evidence in the case tending to show that the offense committed was manslaughter, the jury should not have been precluded by the trial court from such a finding and limited to the finding of murder, the higher grade of homicide, or acquittal.

The trial court having had its attention called by the motion to the disregard of the defendant's rights, should have corrected the evil in the only way possible, by granting a new trial; it follows that the Supreme Court of the Territory erred in not so holding.

5. The Trial Court Was Without Jurisdiction to Try the Case.

The legislature of the Territory was without power to enact the law under which the prosecution was had, for which reason the law was null and void.

The Territory of Oklahoma is a municipal corporation created by the sovereign United States as an aid in the matter of municipal rule.

The act of Congress approved May 2, 1890, chap. 182, 26 Stat. 81, by which only its existence is justified, does not

indicate that there was any intention on the part of Congress to abdicate the sovereignty of the United States over the Territory included or people living within its limits, or to create a new legislative power within those limits, which should supersede or even stand upon the same plane of authority as that of the United States, even if it were competent for Congress to have done either.

The act clearly contemplates that the municipality should be restricted in its powers of legislation to such other subjects and conditions as had not been already provided for by the Constitution and laws of the United States.

Such legislative power as is conferred by the act is granted by section 6, and this is specifically confined—

> "to all rightful subjects of legislation *not inconsistent* with the Constitution and laws of the United States,"

and by section 28 of the act it is provided that:

> "The Constitution and *all* laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States."

At the time of the passage of the organic act there were in force in the territory included within the limits of Oklahoma certain laws of the United States which covered specifically the offenses of murder and manslaughter when committed "in a place or district of country under the exclusive jurisdiction of the United States." The laws of the United States to which reference is had are sections 5339 and 5341 of the Revised Statutes. The organic act does not repeal them in terms. It emphasizes the fact that Congress intended that they should continue in force.

The provision of the organic act making the criminal Code of Nebraska operative in the Territory until the end of the first session of the legislative assembly does not operate as a repeal by implication. The import of the provision is

that the Nebraska Code should be in force only where not inconsistent with the laws of the United States.

To that effect is the decision in Ex parte Larkin, 1 Ok. 53, where the court said:

> "It was intended by Congress that the laws of Nebraska should constitute a territorial code, *as distinguished from the laws of the United States in force* in the Territory of Oklahoma, and that they should sustain the same relation to the courts and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

This statement was approved in United States *vs.* Pridgeon, 153 U. S. 48.

The merest comparison of sections 5339 and 5341, R. S. U. S., with sections 2078 and 2086 of the laws enacted by the Territory, shows that the latter are irreconcilably inconsistent with the former.

The question presented in the case at bar is the same as that presented in Goodson *vs.* United States, 7 Ok. 117. In the case of Goodson there was a statute of the United States and a statute passed by the Territory, each of which covered the offense charged. The defendant's contention, as stated by the court, was:

> "That when Congress created the Territory of Oklahoma and authorized the legislature of the Territory to legislate on all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, the United States *surrendered* its jurisdiction over all crimes not strictly pertaining to federal matters and delegated to the Territory the right to define crimes and punish violations of its laws committed at any place within the borders of the Territory, and that defendant should have been indicted in the territorial court under the laws of Oklahoma."

The contention was held to be unfounded, the court saying (Rec. p. 138):

> "The legislative power does not extend to a right to repeal a law of Congress. There is nothing in the organic act which in itself repeals the laws of the United States, making certain acts criminal when committed in the Indian country, and it can only be by reason of the fact that the legislature of the Territory has passed laws defining the same offenses that it is claimed that such repeal is effected. There might be stronger grounds for this contention were it not for the fact that the legislative power of the Territory is limited to all rightful subjects not inconsistent with the laws of the United States. It would not be contended that had the Oklahoma legislature never passed any laws making these same offenses criminal and punishable, the laws of the United States are not still effective for punishing such crimes committed in the Indian reservations within the Territory."

See also Allen v Reed 60 Pac. 785-7.

No more can it be contended that if the legislative assembly had passed no statute on the subject of murder and manslaughter, the offenses would not be punishable in the Territory under sections 5339 and 5341, R. S. U. S.

In reference to the limitation on the power of the legislature of the Territory, by the organic act, the court (p. 135) further say:

> "And Congress by this limitation on the legislative power of the Territory, withheld from the Territory the authority to legislate on such matters as it had already made provision for."

The court, referring to the case of Pridgeon, say, that in the views expressed, there is no conflict with those expressed by this court in that case.

It follows that if plaintiff in error, in killing Doyle, committed either the offense of murder or of manslaughter, he

should have been indicted and tried under the laws of the United States and not under the laws of the Territory.

Because of lack of jurisdiction in the trial court the decision of the Supreme Court of the Territory should be reversed and the case remanded with instructions to quash the indictment for lack of such jurisdiction.

If the opinion of this court should be otherwise, and it should be of opinion that either one or all of the other propositions contended for by plaintiff in error are well founded, the decision of the Supreme Court of the Territory should be reversed and the case remanded with directions to grant a new trial.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA.

Brief for Plaintiff in Error in Reply to Supplemental Brief for the Territory.

The question of the jurisdiction of this court was raised for the first time at the hearing, and counsel for plaintiff in error regrets that lack of time has precluded more than a hasty examination of it and that its consideration must of necessity be limited to the points suggested in defendant's supplemental brief, which was received on Thursday last.

Section 6 of the act of Congress of February 6, 1889, 25 Stats. 655, 656, referred to in the supplemental brief, provides for the allowance of writs of error to this court as a matter of right—

> "in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States."

It is contended on behalf of the Territory that its courts are not "courts of the United States," but merely "legislative courts," and hence the act has no relation to them.

If the words, "any court of the United States," used in the act were intended by Congress to apply solely to the courts created under the authority of article 3 of the Constitution, then undoubtedly the position is correct, but counsel for plaintiff in error respectfully submits the following considerations in support of the contrary view:

That Congress gets its powers to create courts and governmental agencies of every kind from the Constitution of the United States must be admitted.

The framers of the Constitution, deeming one supreme judicial court necessary in the federal scheme of government, provision was made for it in that instrument; other courts inferior to the Supreme Court would also be necessary in the administration of the affairs of the Federal Government and provision was made for their creation by Congress.

Some of these courts would necessarily exercise their functions in localities where the jurisdiction of the United States would not be exclusive, as in the States of the Union, and others would exercise their functions in localities where the jurisdiction of the United States would be exclusive, as in the district which would become the seat of government and the territory of the United States not included within the limits of a State.

The several provisions of the Constitution relating to judicial administration should be considered and construed together in determining the relations which they bear to each other under the Constitution and the acts of Congress.

The first mention of courts in the Constitution is in clause 9 of section 8 of article 1, where it is said that Congress shall have power "to constitute tribunals inferior to the Supreme Court."

By section 1 of article 3 provision is made for the creation of inferior courts of the kind first mentioned above, whose functions were to be exercised in States where the jurisdiction of the United States was not exclusive; in view

of other provisions of the instrument this section should be construed as if it read:

> "The judicial power of the United States" (in so far as its exercise is concerned in the States where the federal jurisdiction is not exclusive) "shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," etc.

By clause 17 of section 8 of article 1, Congress is given power:

"To exercise exclusive legislation in all cases whatsoever," over the district which may become the seat of government. To this clause is to be referred the power of Congress to create courts and subordinate governments in the District of Columbia.

By clause 2 of section 3 of article 4, it is provided that Congress shall have power to make "all needful rules and regulations" respecting the territory of the United States. The power of Congress to establish courts and subordinate governments in the Territories has been referred to this clause.

As to all places such as the District of Columbia and the Territories, where the federal jurisdiction is exclusive, the constitutional power of Congress to create courts is plenary, and not subject to the limitations contained in article 3, as to the tenure of office of the judges, etc.

In considering the relations to particular circumstances, of both kinds of these inferior courts, they have sometimes been designated in contradistinction to each other as "constitutional courts" and as "legislative courts," and the latter have, in the decisions of this court and in the legislation of Congress, been designated as "courts of the United States;" inasmuch as they, equally with the courts created under article 3, have a constitutional warrant for their existence, no reason is apparent why they may not be properly designated as "courts of the United States," and treated to all

intents and purposes as such; and at least as falling within the words when used in an act of Congress unless necessarily excluded by the context or other sufficient reason.

One instance will serve as an illustration: Section 29 of the act of May 2, 1890, the organic act of the Territory of Oklahoma, after defining the limits of the Indian Territory, proceeds as follows:

> "And the jurisdiction of the *United States Court* established under and by virtue of an act entitled, An act to establish a *United States Court* in the Indian Territory and for other purposes, approved March 1, 1889, is hereby limited to," etc.

The Court of Appeals of the District of Columbia had before it in the case of Moss *vs.* U. S., 32 Wash. Law Rep. 342, the question whether the Supreme Court of Columbia was a "court of the United States," and held that it was. In the opinion of the court, which was delivered by Mr. Chief Justice Alvey, several decisions of this court are cited in which the courts of the District of Columbia are referred to as "courts of the United States," and it is held that the courts established under provisions of the Constitution, other than those contained in article 3, are equally with those established under that article "courts of the United States for the administration of the laws of the United States."

The case of McAllister *vs.* U. S., 141 U. S. 174, is cited in defendant's brief as sustaining the contention, but it is submitted that the views above expressed are not inconsistent with the decision in that case, rightly considered. The court say, after citing a number of its previous decisions:

> "These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the Territories created under

> the plenary municipal authority that Congress possesses over the Territories of the United States are not courts of the United States created under the authority of that section."

But because the court held in the case of McAllister that, as district judge for the District of Alaska, he was not a judge of a "court of the United States" within the meaning of the words as used in section 1768, R. S. U. S., it does not follow that the courts of the Territory are not to be considered as courts of the United States within the meaning of other acts of Congress.

We are not unmindful of the fact that this court held in the case of Cross *vs.* U. S., 145 U. S. 571, that the act of 1889 did not contemplate a writ of error to an appellate court; but an observation of the court in the case is important in an aspect of the case at bar, which will be shown presently. That observation was as follows:

> "And moreover, if the disposal of the motion turned on this point, the words 'any court of the United States' are so comprehensive that used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other."

The Jurisdiction of This Court to Entertain the Writ of Error is Not Necessarily Dependent Upon the Act of 1889.

Section 9 of the organic act provides for district courts and a Supreme Court among others, who are to possess—

> "chancery as well as common law jurisdiction and authority for the redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property;"—

and further provides that "writs of error, bills of exception and appeals shall be allowed in all cases from the final de-

cisions of the district courts to the Supreme Court," and that—

> "Writs of error from the final decisions of the Supreme Court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States"—

where the value of the property or the amount in controversy shall exceed $5,000.

Plaintiff in error contends that under other provisions of the organic act, when considered in connection with the act of March 3, 1891, establishing circuit courts of appeal, the appellate jurisdiction of the Supreme Court of the United States is extended to capital cases decided in the Territorial Supreme Court.

By section 28 of the act "the Constitution and all laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States." It is apparent from this section that Congress intended that the people of the Territory should be on the plane of equality with their fellow citizens elsewhere, in the enjoyment of rights and privileges, respecting judicial procedure and otherwise, in and out of court, secured by the Constitution and laws of the United States.

From section 13 of the act it appears that the courts of the Territory were to exercise "jurisdiction as circuit and district courts of the United States." It follows that any law of the United States then in existence or thereafter to be passed relating to remedies or to the rights otherwise of parties to cases in the district and circuit courts of the United States should be extended to parties similarly situated in the courts of the Territory.

By the judiciary act of March 3, 1891, circuit courts of appeal were established in each circuit. By section 4 of the

act the appellate jurisdiction of the circuit courts was abolished; and by section 6 of the act jurisdiction was conferred upon the circuit courts of appeals to review by appeal or writ of error the final decisions of the district and circuit courts in all cases except those mentioned in section 5 of the act, and the decisions of the circuit courts of appeals was made final.

Among the cases excepted in section 5 were "cases of conviction of a capital crime." As to these section 5 provided that a writ of error or appeal should lie directly to the Supreme Court. The circuit courts of appeal have therefore no appellate jurisdiction from the district or circuit courts in a capital case.

By the 15th and last section of the act it is provided that the several Territories shall by order of this court be assigned to particular circuits, and the Territory of Oklahoma was assigned by the court to the eighth judicial circuit on May 11, 1891 (139 U. S. 707); and it further provides that in all cases in which the judgments of the circuit courts of appeal are made final by the act that such courts—

> "shall have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders, or decrees of the district court and circuit court."

As no jurisdiction was conferred upon the circuit courts of appeal to review the judgments of the district or circuit Courts in a capital case they acquired by section 15 no appellate jurisdiction to review the judgment of a Territorial Supreme Court in a capital case, and if in such a case there is no appellate jurisdiction in this court to review the judgment of the Territorial Supreme Court, the singular anomaly is presented that under the law the judgments of the Territorial Supreme Courts in cases less than capital are subject

to review on writ of error or appeal, while in capital cases their judgments are final.

This could not have been intended by Congress. The act of May 2, 1890, requires that the capital case, like all others, shall be first reviewed in the Supreme Court of the Territory, and to preserve the doctrine of equality under the Constitution and laws of the United States between the people of the Territory and their fellow citizens elsewhere in the matter of rights and remedies, including the boon of an appeal to this court, it follows that the Supreme Courts of the Territories in such cases should stand in the same relation to this court that the circuit courts do in the matter of such appeal, in order that discrimination should be avoided as to persons in the same relative situations.

In Queenan *vs.* Oklahoma, 190 U. S. 548, this court entertained jurisdiction of a writ of error to the Oklahoma Supreme Court in a capital case. In doing so, if not actuated by considerations such as are above expressed, it was actuated by stronger ones.

HUGH T. TAGGART,
Attorney for Plaintiff in Error.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

October Term, 1904.

NO. 226.

JOHN T. NEW,
Plaintiff in Error,

vs.

THE TERRITORY OF OKLAHOMA,
Defendant in Error.

Brief and Argument of Defendant in Error.

STATEMENT OF FACTS.

The plaintiff in error, John T. New, was tried on the charge of murder in the District Court of Washita county, Oklahoma Territory, and convicted. He was sentenced to imprisonment at hard labor for life. From the judgment of the tri-

al court he prosecuted an appeal to the Supreme Court of Oklahoma, where the case was heard on error, and the judgment of the District Court was affirmed. From this judgment of the Supreme Court of Oklahoma Territory, he comes on error to this court.

The plaintiff in error, John T. New, and the deceased, H. F. Doyle, were both residents of Washita county, Oklahoma. They were residing on farms, their lands being adjacent to each other and their respective dwelling houses were about one mile apart. (See diagram attached to transcript record, marked "Exhibit A.") New and Doyle had married sisters. On the 13th of April, 1901, Doyle and his brother-in-law, Walter A. Reaves, were returning from a trip they had made to the town of Granite, about twenty miles distant. The trouble occurred in the evening, about an hour and a half before sunset. Doyle and Reaves were traveling in a wagon, sitting on chairs, and Doyle was driving, holding a line in each hand. They were driving a pair of loose horses belonging to Reaves in front of their team and were traveling east along the public road that led to the home of Doyle and were about half a mile from it when the trouble occurred. Before reaching Doyle's home they had to cross a public road running north and south which intersected the road on which they were traveling. On the north side of the road they were traveling and east of the north and south road was John New's pasture. As they approached this pasture they saw John New at the corner, ap-

parently engaged in working at the wire or gate. The defendant claims that he had taken his winchester rifle and gone down by a ravine a short time prior to this to look for some ducks, but failed to find any and seeing a steer out in the road that he believed to be his, came down to the gate, drove him in and was engaged in fixing the wire at the time he saw Doyle and Reaves coming down the road.

The evidence is to the effect that New looked up and saw them coming but pretended to go on with his work and waited until they were within about sixty yards of him when he started to walk down the fence line, picked up his winchester rifle, threw it up to his shoulder quickly and fired at Doyle. Doyle jumped out of the wagon on the south side, leaving the wagon between him and New. Reaves seeing New throw the shell out of his rifle, jumped out on the same side with Doyle. New shot again, the bullet going between Doyle and Reaves, at which Reaves started to run and went a little west and then took the road south. Doyle's team became frightened and broke away from him, ran a short distance and fell down, one of the horses being killed by one of the shots from New's rifle, which passed through its body. Doyle started to run down the road east to the house of G. E. Trotter, a neighbor, New firing at him as he ran. Several shots missed him and then New rested his rifle on a post, took deliberate aim at Doyle and shot him, the ball passing through his thigh. Doyle threw his hand to his leg where he was shot, sank down,

but got up and went on running toward Trotter's house. As Doyle neared the house he saw Trotter standing near the house and cried out to him "Do not let him kill me" and Trotter, seeing New coming, went out to try and stop him. He intercepted New and caught him, but New jerked loose, from him, saying, "God damn you, turn me loose," and rushed on toward the house. In the meantime, Doyle had reached the house. Mrs. Trotter had come out and he said "For God's sake, don't let him kill me." She told him she would do all she could to keep him from it, and he said he wanted to go in the house. She opened the door for him and he went in. She shut the door and went to the outside again, saw New coming and caught hold of him and asked him not to go in. He kept on going into the house, pulling her along, and she said "For God's sake, don't kill him in my house." He said "If you will turn me loose, I won't," and took hold of the door knob and went in. He pushed on into the room where Doyle had taken refuge and found him sitting on the floor behind the door. New then deliberately shot Doyle as he was sitting there helpless, the ball going in at the left cheek and coming out in the side of the neck and down into the shoulder, a mortal wound, and then after shooting him, used his gun as a club and crushed in his skull. New then went out and procured a horse and made his escape to Greer couty where he was arrested a week later by the sheriff of Washita county. An inquest was held over the body of Doyle by a Justice

of the Peace who testified that he found a revolver on the body of Doyle in his inside vest pocket and that it was fastened in with a safety pin and that it was difficult to remove the revolver as it seemed to be cankered and would not slip easily. Other details of the evidence will be considered further on in the brief and the testimony of the defendant will be given in full.

ARGUMENT.

The first assignment of error by plaintiff in error is that the trial court erred in refusing to give the following instruction requested by defendant, below to the jury:

"You are instructed that if from the evidence you entertain a reasonable doubt as to the cause of the death of the deceased, that is, if you are in doubt as to whether or not he died from the effects of gun shot wounds or from the effects of injuries inflicted by a blow upon the head by some deadly instrument, then it is your duty to acquit the defendant."

This instruction was evidently presented by the defendant below upon the theory that there was a fatal variance between the allegations of the indictment and the proof in support thereof in the description of the instrument used and character of the wound inflicted which resulted in the death of Doyle.

I hardly think this proposition entitled to the serious consideration of this court. The allega-

tion in the indictment as to the character of the weapon and injury received by Doyle, is as follows:

"Then and there with a certain Winchester rifle loaded with gun powder and divers leaden bullets, shoot a bullet into the body of him, the said H. F. Doyle, and so inflicted and so made a mortal wound upon and in the body of the said H. F. Doyle, of which mortal wound, so inflicted and so made in the manner and form and with the purpose aforesaid, the said H. F. Doyle, on said 13th day of April, 1901, and in said Washita county aforesaid, did die, etc." (See printed record, page 17.)

The defendant evidently proceeds upon the theory that because the evidence showed that New inflicted upon the body of Doyle two wounds, both of which were necessarily fatal, and only one of which was described in the indictment, that thereby there is a variance between the allegation and the proof. There is nothing in this contention. They evidently argue the question upon the theory that the testimony of Dr. McLain (printed record 49, 50, 51) was the only evidence offered upon the question as to what caused the death of the deceased. The doctor examined the body of Doyle after his death and found both fatal wounds, being the shot which went entirely through Doyle's face and neck and embodied itself in his shoulder, and the crushing in of the skull by a blow struck on the head with a rifle in the hands of New. While it is true that this witness stated that he could not tell whether death was caused from the gun shot wound or from the blow on top of the head, it does not fol-

low that the jury could not have found from other evidence what caused the death of the deceased. Either of the two wounds was fatal. The gun shot wound was such that it did not require an expert to show its character or effect. The indictment alleged the gun shot wound, which resulted in death and the evidence completely supported the allegation.

The charge of the Judge was "to find the defendant guilty as charged in the indictment, or acquit" and by their verdict, the jury found him guilty as charged in the indictment. It does not make out a case of variance if, in addition to the proof that is necessary to sustain the indictment, the prosecution goes farther and shows other wounds which were administered by the defendant to the deceased.

> "State vs. Fox. 25 N. J. L. 566. Opin. 601. For the substance of the matter is that the party inflicted a mortal wound whereof the deceased died."

The non-expert witnesses testified with regard to the gun shot wound through the head, and the defendant, New, himself, testified that he shot the deceased first and then struck him over the head with the rifle, his testimony on this point being as follows:

"Q. Did you go into the room?
A. I did.
Q. What did you do?
A. I shot him.
Q. What was he doing?

A. He was sitting on the floor behind the door. When I opened the door I saw him there behind the door.

Q. What did you do?

A. I saw him there behind the door when I opened the door and shot him as quick as I could.

Q. What was he doing?

A. Still working at his left breast.

Q. What did you do after you shot him?

A. Struck him with the gun.

Q. Where?

A. In the head.

Q. Did you do anything after that?

A. I turned and walked out."

According to the theory of the plaintiff in error, the Territory should have only introduced evidence to prove the infliction of the gun shot wound and that when in addition to the gun shot wound the infliction of another wound, which of itself would have been fatal had not the gun shot wound been inflicted, was put in evidence, that a case of variance arose. Such a contention is wholly untenable. It was entirely proper, in fact necessary, to show the entire transaction and all of the wounds inflicted by New on Doyle and the Territory saw fit in framing the indictment against New to select whichever one of these wounds it deemed the fatal wound, or a fatal wound, and then the case was submitted to the jury upon the proposition as to whether or not the evidence sustained the allegation in the indictment beyond a reasonable doubt.

As before stated, they were instructed that they must either find the defendant guilty as charged or acquit.

The instructions were plain and unambiguous and the jury found that the gun shot wound was the cause of the death of Doyle.

This is in perfect harmony with the evidence, for the defendant, New himself, admits that he shot him first and then crushed in his head afterwards. That the gun shot wound was necessarily fatal. That after inflicting this fatal wound upon the person of the deceased that New saw fit to further mutilate his body by crushing his head with his rifle, is no ground to claim that there is any variance between the allegations and the proof.

The instruction asked for by defendant below was very misleading in its character when applied to the evidence, and was properly refused.

The second assignment of error is as follows:

"The trial court erred in failing and refusing to instruct the jury as to the law of manslaughter, and in failing and refusing to instruct the jury that the defendant might, under the indictment, be acquitted of murder and convicted of manslaughter, the issue of manslaughter being presented by the evidence at the trial, and prejudicial error and injury to the defendant's legal and substantial rights being committed by said trial court in ignoring and failing and refusing to present and submit to the jury said issue of manslaughter."

As to this complaint of the plaintiff in error, the first proposition to which I direct the attention of this court is the fact that the defendant below made no request of the trial court to give the jury such an instruction as that indicated.

The court will observe that the general charge given by the trial judge fully covered the offense charged in the indictment and that the defendant did request numerous special instructions on the trial of said cause, but did not in any manner or form, request the trial judge to instruct the jury that the offense of manslaughter was included in the charge of murder or that under the evidence in the case they might convict the defendant of manslaughter in either degree.

I contend that having failed to request the trial court to give an instruction, such as indicated in the assignment of error referred to, that the defendant thereby waived all right to the same.

He was represented at the trial by able and learned counsel, who contested every point in the case. It was his privilege under the law of the Territory to request the trial Judge to give any special instructions which he desired, and I believe that it was his duty to do so and that when he had requested other special instructions and failed to request an instruction upon the issue of manslaughter that he thereby waived the right to have such an instruction given, unless it was the absolute duty of the court, under the law of the Territory of Oklahoma, to have given such an instruction without being requested to by the defendant.

This brings us to a consideration of the proposition as to whether or not it is necessary in all cases of trial for homicide to instruct the jury not only upon the question of murder, but also upon

the question of manslaughter, whether the evidence does or does not tend to prove either of the degrees of manslaughter.

If it was the duty of the trial court to instruct the jury that the offense of manslaughter in the first and second degrees was included in the charge of murder, when there was no evidence at the trial which tended to prove either of the degrees of manslaughter, or which would have authorized the jury to find the defendant guilty of either of the degrees of manslaughter, then the trial court erred in not giving such an instruction.

But on the other hand, if it is the duty of the trial court to make the instructions conformable to the evidence and to only instruct the jury as to the law relative to those offenses which the evidence tends to prove, then it was not the duty of of the court in this case to instruct the jury that the offenses of manslaughter in the first and second degree were included in the charge of murder.

I contend that the law is definitely settled that where the evidence tends to prove only the higher and does not tend to prove the lower offense, that it is not necessary for the court to give an instruction to the effect that the defendant may be found guilty of the lower offense.

On the other hand, I concede that the law is just as well settled that where the evidence does tend to prove the lower offense, it is the duty of the court, when requested, to charge the jury as to the law of the lower offense which the evidence tends to prove.

It became the duty of the court, as a matter of law, to determine which one of these two rules was applicable in the trial of this case.

In support of my proposition that the court must determine as a matter of law what offense or offenses the evidence tends to prove, I submit the following authorities:

"But it is not necessary to instruct as to the lower degrees or offenses where there is nothing in the evidence tending to show the defendant to be guilty of such lower degree or offense and not guilty of a higher degree or offense charged."

1 McClain, Crim. Law. Par 391.

"Crime in Degrees.—If there are different degrees of an offense, the law should be given of each degree which the evidence tends to prove; otherwise, of any degree which it does not."

1 Bishop, New Crim. Procedure. Par. 980.

"The charge to the jury.—Should follow the rules stated in the first volume. Thus it should accurately give the law of whatever degree of the offense the evidence tends to prove, but not of the other degrees."

2 Bishop's New Crim. Procedure, Par 638.

I contend that before a court would be authorized to submit the offense of manslaughter to the jury under an indictment for murder, that there must be some appreciable evidence relative to the issue of manslaughter. That the court must determine as a matter of law whether there is any such evidence and if there is not, then he should refuse to instruct the jury as to manslaughter. On the other hand, having determined that there is

some evidence relative to the issue of manslaughter, then the credibility and force of such evidence must be for the jury and cannot be a matter of law for the decision of the court.

162 U. S. Supreme Court Rep. Stevenson vs. United States. p. 315.

Indeed, I believe it to be the law that even should the court instruct the jury as to manslaughter, when the evidence did not warrant an instruction upon such an offense, and the charge in the indictment being murder, that it would be a reversible error, even though the jury convicted the defendant of the lower offense. In support of this contention I cite the case of the State vs. Punshon, found in 124 Mo. Supreme Court Rep., pages 448 to 459 inclusive, and I extract therefrom the following:

The fifth paragraph of the syllabus is as follows: "Manslaughter.—Instructions.—Reversible Error.—Where the evidence on a trial for murder shows conclusively that the accused is either guilty of murder in the first degree or innocent of any crime, an instruction on manslaughter is reversible error, if he be convicted of manslaughter."

I extract from the opinion of the court in this case the following: "Another contention is that the court erred in instructing the jury on manslaughter in the first degree. That there was no evidence whatever upon which to predicate such an instruction is admitted by the Attorney General in his printed brief, but he argues, that, of this, de-

fendant cannot complain, because, we presume, of his conviction of a less offense than that for which he was indicted and put upon his trial. We do not understand this to be the law. While by statute it is made the duty of the court to instruct upon every phase of the case warranted by the evidence, IT IS NOT ITS DUTY TO INSTRUCT UPON ANY GRADE OF OFFENSE NOT AUTHORIZED BY THE EVIDENCE, AND IT IS ERROR TO DO SO. State v. Allen, 116 Mo. 548; State v. Herrell, 97 Mo. 105; State v. Wilson, 88 Mo., 13; State v. Turlington, 102, Mo. 642. In State v. Starr, 38 Mo. 272, it is said: "It is the duty of the court to instruct the jury with reference to the testimony in the case, and where the evidence all tends to prove one offense, it is wrong to mislead the jury by giving it instructions in relation to a different one." The instruction only had a tendency to mislead the jury, which it is evident from the facts in this case, as disclosed by the record, it did do. "Defendant was either guilty of murder in the first degree or not guilty of any offense at all, and the instructions should have been confined to that offense."

Is not this authority analogous to the case at bar? The charge in the indictment is murder. The defendant, New, was placed upon his trial, all the evidence tended to sustain the charge of murder in the first degree, and nothing else. He was either guilty of this offense or nothing. The only defense which he offered upon the trial was justifiable homicide. He made no request of the court to instruct the jury as to the degrees of man-

slaughter. Now this being the case, if the court had voluntarily and of its own motion, instructed the jury as to the degrees of manslaughter and the defendant had been found guilty of one of them, would he not then have been in a position to have contended that the court erred in instructing as to the degrees of manslaughter and that he might have been acquitted of the offense had the court not so done?

In the case of the State v. Duncan, 116 Mo., 312 inclusive, this same principle is ably discussed by that court. The 18th paragraph of the syllabus is as follows: "Manslaughter: Self Defense: Where the defendant's theory is that he killed an officer while resisting an unlawful arrest, he is not entitled to an instruction on manslaughter, but only to one as to self defense."

I extract the following from the opinion of the court on page 312: "It is, however, insisted that instructions should have been given covering manslaughter in the third and fourth degrees. There is no sound basis for such instructions presented by this record and for these reasons: If the police officers were not endeavoring to arrest the defendant, were not acting in their official capacity as peace officers, then the defendant had the undoubted right to resist them and their unlawful assaults, just in the same manner and to the same extent as those of a private individual. The law throws around an officer its special protection only while engaged in the performance of some official duty,

not otherwise." State v. Clayton, 100 Mo. 521 and cases cited.

If then, the officer or officers were not honestly endeavoring to arrest the defendant, but were simply endeavoring to wreak their personal malice against him, then the instructions given on the theory of self defense were all that the defendant could of right demand. If, on the contrary, the defendant was only engaged in resisting a lawful arrest, there was in legal contemplation, no hot blood, none of the elements or conditions of manslaughter in the case; for in such circumstances, "passion is wickedness and resistance crime."

Under the laws of the Territory as defined by our Crimes Act, homicide is defined to be murder as follows: "First; when perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. Second; when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third, when perpetrated without any design to effect death by a person engaged in the commission of a felony."

The indictment in this case was drawn under the first sub-division of the definition of murder as above given.

It is also provided by our statute as follows: "Homicide, committed with a design to effect death, is not the less murder because the perpetrator

was in a state of anger or voluntary intoxication at the time.

"A design to effect death, sufficient to constitute murder, may be formed instantly before doing the act by which it is carried into execution."

"A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed."

It is further provided by the statutes of Oklahoma Territory that homicide is manslaughter in the first degree in the following cases: "First, when perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor. Second, when perpetrated without a design to effect death and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide. Third, when perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed."

It is further provided by the statutes of Oklahoma Territory that homicide is excusable and justifiable in the following cases:

"Homicide is excusable in the following cases: First, when committed by accident and misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with usual and ordinary caution and without any unlawful intent. Second, when committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, provided that no undue advantage

is taken, nor any dangerous weapon is used and that the killing is not done in a cruel or unusual manner.

"Homicide is justifiable when committed by public officers and those acting by their command, in their aid and assistance, either; First in obedidience to any judgment of a competent court; or, Second, when necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty, or; Third; when necessarily committed in re-taking felons who have been rescued or who have escaped, or when committed necessarily in arresting felons fleeing from justice.

"Homicide is also justifiable when committed by any person in either of the following cases: When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is; or, Second, when committed in the lawful defense of such person, or of his or her husband or wife, parent, child, master, mistress or servant, when there is reasonable ground to apprehend the design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished; or Third, when necessarily committed in attempting, by lawful ways and means to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace."

The defendant attempted in this case to justify the killing of Doyle under the provisions last above quoted, conferring upon a person the right to commit a homicide in the lawful defense of his person, and upon the theory that he believed that the deceased, Doyle, was about to kill him. The

evidence of the prosecution made out a case of murder beyond any reasonable doubt. The defendant offered no evidence which tended to reduce the degree of the crime from murder to manslaughter, but based his entire defense upon the claim of self defense.

By section 5515 of Procedure Criminal, Vol. 2 Wilson's Statutes of Oklahoma Territory, it is provided: "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation or that justify or excuse it devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

This statute does not relieve the Territory of the duty of proving the defendant guilty beyond a reasonable doubt, but it merely casts upon the defendant in a case, where he seeks to lower the degree of the offense charged, the burden of introducing sufficient evidence to raise a reasonable doubt as to the degree of the crime of which he may be guilty.

The various Acts quoted above are undoubtedly subjects upon which the Legislature of the Territory of Oklahoma may lawfully legislate, and these Acts have been been considered and construed by the Supreme Court of the Territory of Oklahoma and I contend that this construction is binding upon this court.

In the case of Gatliff v. The Territory of Ok-

lahoma, 2 Okla. 523-534 inclusive, our court said: "Objection is made to the instructions because the court did not instruct the jury that they might find the defendant guilty of an offense as low as that of a simple assault. While it is true that a defendant may be indicted for murder and found guilty of an assault and battery, yet it is unnecessary under an indictment for murder or for an assault with intent to kill, that the court should instruct the jury that the defendant may be found guilty of an assault and battery, much less of a simple assault. IF THE EVIDENCE TENDED TO SHOW that the defendant was guilty of an assault with intent to kill, or of assault with intent to do bodily harm, or was innocent as we must presume in the absence of the evidence and on the record before us, that it did, it would be improper for the court to instruct the jury that the defendant might be found guilty of some lesser offense and one of which the evidence did not tend to prove him guilty.

"IT IS UNNECESSARY FOR THE COURT TO GIVE AN INSTRUCTION THAT THE DEFENDANT MAY BE FOUND GUILTY OF A LOWER OFFENSE, WHERE THE EVIDENCE TENDS TO PROVE ONLY THE GREATER."

In the case of Lawson v. Territory of Oklahoma, 8th Oklahoma pages 1 to 11 inclusive, our court laid down the doctrine just as forcibly, that in a case where the evidence did tend to prove the defendant guilty of a lower degree of crime than that charged, that it was the duty of the court to instruct the jury upon such lower offense and in

this latter case, on page 9 of the opinion, is found the following language: "If any evidence is introduced which tends to reduce the killing to manslaughter, it is a matter for the jury to determine whether it is murder or manslaughter, and not for the court."

Thus our own Supreme Court has laid down the rule under the laws of our jurisdiction, first, that where the evidence tends to prove only the higher, and does not tend to prove the lower offense, it is not necessary for the court to give an instruction to the effect that the defendant may be found guilty of a lower offense than the one charged, and on the other hand, that where the evidence does tend to prove the lower offense, it is the duty of the court, when requested, to charge the jury as to the law of the lower offense, which the evidence tends to prove.

In the opinion of the Supreme Court of Oklahoma in the case at bar, the court says: "The question is squarely raised here whether it is necessary in all cases of trial for homicide, to instruct the jury not only upon the question of murder, but also upon the question of manslaughter, whether the evidence does or does not tend to prove either of the degrees of manslaughter." The court then quotes the rule as laid down above, citing the cases of Gatliff vs. the Territory and Lawson vs. the Territory, and then say: "The only question then, is to determine which one of these two rules applies in this case. IT IS THE PROVINCE OF THE COURT TO DETERMINE WHETHER THERE IS OR IS NOT ANY

EVIDENCE WHICH TENDS TO PROVE THE LOWER DEGREE OF CRIME and when the court has determined that there is some evidence tending to prove the lower degree, then it is the duty of the court to instruct the jury IF REQUESTED, upon such lower degree. To apply the rule, we must consider the defendant's testimony, as upon this alone can there be any claim to manslaughter."

The court then proceed to give an analysis of the evidence of the defendant and to see if, from the testimony of the defendant himself, giving it the most favorable light to him, there is any evidence which tended to reduce the offense charged from murder to manslaughter.

After giving the evidence, the court then said, "The above includes the entire evidence of the defendant covering the period of the difficulty. Where in it can we find anything that tends to reduce the crime to manslaughter? The first of the three definitions of manslaughter in the first degree, as laid down in the statute, is where the homicide is "perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor". This paragraph cannot apply, because the defendant was not engaged in the commission of a misdemeanor, and it cannot possibly be said that there was no design to effect death."

The second paragraph of the law of manslaughter in the first degree is where the homicide is "perpetrated without a design to effect death, and in the heat of passion, but in a cruel and unu-

sual manner, or by means of a dangerous weapon, unless it is committed under such circumstances as constitute excusable or justifiable homicide." Neither can this provision apply, because it cannot be said that the homicide was committed without a design to effect death.

The third paragraph of the section defining manslaughter in the first degree, is where the homicide is "perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed." This is the provision of the law which the plaintiff in error claims applies in this case and the one which it is claimed the court failed to cover by proper instructions.

It will be noticed that the only testimony which it is claimed has a bearing on this subject and makes this provision of the law of manslaughter applicable, is that of the defendant himself, that when he looked up and saw the deceased forty or fifty yards distant, he was in the act of putting his hand inside his clothing in a manner which made the defendant think he was attempting to draw a revolver. Now, if the act of the deceased was sufficient to justify the defendant in this belief, in other words, if the act of the deceased was such as to make a reasonable man believe that he was in imminent danger of his life or great bodily harm, then there was sufficient justification for the defendant's act. But where is the element of unnecessary shooting? That is the principal element of the third subdivision of the law of man-

slaughter in the first degree. That is, the homicide must have been perpetrated unnecessarily, and, of course the homicide must have been perpetrated not only unnecessarily, but without premeditation or design. Where the evidence of the prosecution shows the killing to have been murder and the evidence of the defendant tends to show the killing to have been justifiable, it is only necessary that the instructions of the court should cover the law of the case as shown by the evidence.

State v. Hendricks, Kans. 4 Pac. 1050; People v. Lee Cam, Cal., 11 Pac. 183; Territory v. Baker, N. M., 13 Pac. 30; State v. Reed, 117 Mo. 604; State v. Fairlamb, 121 Mo. 138; State v. Kilgore, 70 Mo. 546.

If the theory of the defendent was sustained by his evidence, then the firing of the shot was justifiable, and even had the death of the deceased resulted from this first shot, there would have been nothing to introduce the element of manslaughter into the case, but let us observe the further conduct of the defendant, not only for the purpose of finding if there is anything which would have introduced the element of manslaughter into the case, but if it does not absolutely repel the thought that the defendant could have been guilty of either of the degrees of manslaughter, and that he was either guilty of murder as charged or nothing.

As said by our court in its opinion, "Even if the acts of the defendant at the beginning of the shooting, separated from the latter part of the difficulty, would have been deemed justifiable, yet his

following upon the deceased, his deliberate shooting by laying his Winchester rifle upon a fence post and his continued following up and continued shooting at the deceased, after he was wounded and while he was fleeing, and the vicious manner in which he spoke to Trotter when Trotter tried to persuade him to desist the pursuing of deceased into the inner room of the house, to which he had fled for safety, and the deliberate manner in which he entered the room and shot the deceased, all show a viciousness of mind for which there is no excuse whatever and which must have impressed the court and the jury with the fact of the premeditated design of the defendant to kill the deceased, and which cannot be held to show that the homicide was perpetrated unnecessarily, either while resisting an attempt by the person killed to commit a crime or after such attempt had failed."

I desire to call the attention of the court especially to the testimony of this defendant himself, as found on pages 83, 84 and 85 of the printed transcript and record, from which I will extract the following statements made by the defendant: "I saw a steer out in the road that I thought was mine. I had some that had been getting out. I had some boys working on the fence. They had told me that they had not quite got it finished. Austin had. He was working for me at that time. I went down and it was my steer, and I got through the fence and laid my gun down. When I got through the fence I run him back right by the gate, it was a wire gate and he galloped in. The bottom wire being

slack he galloped in. I tacked up the wire. There was some staples out of the post that held the wire up when I got there. I taken the piece of wire off the post and went back to the gate. But before I got back I saw Doyle and Reaves coming,—I supposed it was. I knew them and supposed it was them. I saw Doyle running around the horses that was loose. I thought they was going into Lightfoot's house. He got out and headed them and gave them a scare and they came trotting down the road, and he taken the lines and came driving down. I started on down and they was at that time as much as fifty yards this side of Ben Lightfoot's place, fifty yards closer than when I first saw them. I went down and began to work at the fence and I looked up and saw that it was Reeves and Doyle coming. I kept on working and looked up the second time. At that time they was in about forty or fifty yards. I saw Doyle reach in his bosom like that (indicating in his own bosom). He began to jerk out something, I supposed a pistol. I just reached and picked up the Winchester and fired. * * * * *

Q. What made you fire the first shot?

A. I was afraid he would kill me.

Q. What made you afraid? Why was you afraid?

A. He had threatened to do so and he reached into his bosom and I was afraid he would kill me.

Q. Tell what happened.

A. I shot the first shot and him and Reeves jumped out on the opposite side. I could only see their heads and shot the second time. I had kept right with the wagen until they passed and then the team had run by and they was in plain view and I shot two or three times more.

Q. What was Doyle doing when in plain view?

A. Working at his breast trying to get his pistol out.

Q. What did Reeves do?

A. He turned and ran back west. I do not know what he did. I saw him pass him going back west. I never looked to see.

Q. You say that after the team passed that you saw Doyle holding his hand there at his breast and you shot twice more?

A. Yes sir, I quit shooting when he was something like one hundred yards from me, I quit shooting. I ceased firing and he checked up and turned and looked back and commenced working at his breast again like he was trying to get his pistol out.

Q. What did you do then?

A. I laid the gun on a post and shot him.

Q. What did he do?

A. He ran and kept running.

Q. Did you know whether you hit him that shot or not?

A. I thought I did. He throwed his hand on his leg and I thought I had hit him.

Q. What did you do?

A. I followed him to the house.

Q. What made you follow him?

A. I was afraid he would turn and shoot me.

Q. Was you out of shooting distance?

A. No sir.

Q. How far away was you?

A. About one hundred yards.

Q. You heard the testimony of Mrs. Trotter about what occurred at the door; that you promised her not to go in. If you made such a promise, tell why you made it.

A. I did. 2. Because I was afraid he would shoot through the door or out of the door and kill me while they was holding me.

Q. Did you go in the room?

A. I did.

Q. What did you do?

A. I shot him.

Q. What was he doing?

A. He was sitting on the floor behind the door. When I opened the door I saw him there behind the door.

Q. What did you do?

A. I saw him there behind the door, when I opened the door, and I shot him as quick as I could.

Q. What was he doing?
A. Still working at his left breast.

Q. What did you do after you shot him?
A. Struck him with the gun.

Q. Where?
A. In the head.

Q. Did you do anything after that?
A. I turned and walked out."

According to the evidence of the defendant himself, leaving out the conclusive testimony of the Territory, he was guilty of a most atrocious murder, even if he was justified in firing the first shot, and which it would be preposterous to contend that he was, under the circumstances, even as testified to by himself. His own evidence shows that his mind was full of hatred and malice for Doyle and that he embraced the opportunity to take his life. Even if he believed himself to be in danger when he fired the first shot, that danger immediately passed when Doyle and Reeves jumped out of the wagon and Reeves ran to make his escape and Doyle was endeavoring to control his frightened horses, but New continued shooting at him, hitting one of the horses, from which wound it dropped dead after it had gotten away from Doyle and he continued shooting at Doyle as he started to run to the house of Trotter, his neighbor, until Doyle was about one hundred yards distant from him, when Doyle checked his speed and looked back, at which New deliberately rested his

gun on the fence post and shot him, the ball piercing his thigh. Again Doyle started to run, but New, not yet satisfied, seeing that his victim is not yet dead, pursues him. Doyle reaches the house of Mr. and Mrs. Trotter and implores them not to permit New to take his life. They permitted him to enter the house and go into an inner room and then Mr. and Mrs. Trotter attempted to intercept New when he reached them, in hot pursuit of Doyle. New thrusts Trotter from him, telling him to turn him loose. Mrs. Trotter clings to New in a frantic endeavor to hold him and pleads with him not to murder Doyle in her house. He promises her that he will not, upon which she releases him. He then disregards his promise, enters the house, penetrates to the room where Doyle is hiding and finds him sitting on the floor behind the door. Notwithstanding his helpless condition, New then places his Winchester rifle to Doyle's head and shoots him through the head, inflicting a fatal wound. Not content with this, he clubs his rifle and crushes the skull of Doyle, although already suffering from a fatal wound.

Where in all the record of this case, is any fact or circumstance to remove it from the charge of murder? Even if New had some slight justification for firing the first shot, he has placed himself beyond all claim of justification or of a lesser degree of crime than murder, by his willful and malicious pursuit of Doyle,as he sought to escape from him and then by his deliberate slaying of

Doyle, after he had attempted to seclude himself in a place of refuge.

I will not attempt to embrace in this brief the testimony of Mr. and Mrs. Trotter, but I especially call the attention of the court to their evidence, found on pages 36 to 49 of the printed record.

The testimony of the witness, W. H. Reeves, found on pages 51 to 58 of the printed record, completely does away with the testimony of New that he had any reason to anticipate an attack from Doyle in the first instance, and Reeves was the person who was riding with Doyle in the wagon. I will not attempt to quote his testimony and merely call the attention of the court to the same, as in this discussion and for the purpose of determining this proposition, I have largely dealt with the question from the standpoint of the defendant's own testimony.

Referring again to the proposition that the defendant did not request an instruction upon the subject of manslaughter, I will say that this is a question of criminal procedure and practice in this Territory, and that under our law it was the duty of the defendant, if he desired such an instruction, to have requested it.

In the decision of the case at bar, the Supreme Court of Oklahoma, in its opinion, used the following language: "We think the plaintiff in error has not properly raised this question. If the defendant was entitled to instructions upon this

point, he should have asked the court below to instruct the jury upon the law of manslaughter and in the absence of such a request it was not error for the court to omit to give such instructions.

It is true that the court should instruct the jury upon all questions involved in a case, but when the court has covered the case with general instructions, it is not error to omit to instruct upon some particular branch of the case, deemed advisable by the defendant under his theory of the case; when the defendant has not asked for such instructions." Citing in support of their position, Lovett v State, 30 Fla. 102; Kelley v. People, Col. 39 Pac. 805; State v. Estepp, Kans. 24 Pac. 986; State v. Hendricks, 4 Pac. 1050.

This being a rule of practice established under our criminal procedure in our jurisdiction, I contend that it is also binding upon this court in the determination of this case, and that by reason of the failure of the defendant to request the instruction referred to, that he waived it and is precluded thereby.

I contend that there is no Federal question involved in this case. None of the constitutional rights of the plaintiff in error have been invaded and the questions upon which he asks the decision of this court on error, are those which are governed by statutory laws defining crimes, fixing the punishment therefor and prescribing methods of procedure for the trial of cases arising under the Crimes Act of the Territory of Oklahoma. That

inasmuch as these questions have all been passed upon by the Supreme Court of the Territory of Oklahoma, that unless their decision upon some of the questions involved violates some constitutional right of the plaintiff in error, that the adjudications of the Supreme Court of the Territory of Oklahoma are binding upon this court.

As said by this court in Cargill Co. v. Minn. 180 U. S. 466, "The questions just stated are questions of local law and in determining whether the statute violates any right secured by the Federal Constitution, we must in the particulars named, accept the interpretation put upon it by the State court."

In Tullis v. Lake Erie and Western Railroad, 175 U. S. 348-355, the question was as to the constitutionality of a statute relating to railroads and other corporations, except municipal corporations. The Supreme court of that state held that the statute was capable of severance and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined.

This court followed that view, declaring it to be an elementary rule that it should adopt "the interpretation of a statute of a state affixed to it by the court of last resort thereof" (See authorities cited in support thereof).

In the case of Yazoo and Mississippi Valley Railroad Company v. Adams, 181, U. S., 583, this court said: "Assuming that we may exercise an

independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation, is a sound one. The right asserted depends upon a comparison and construction of such statutes; AND THE SETTLED RULE OF THIS COURT IS THAT EVEN in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state. Burgess v. Seligman, 107 U. S. 20; Flash v. Conn, 109, U. S. 371-379: Clark v. Bever, 139 U. S., 96; Board of Liquidation v. La., 179. U. S., 622."

The same proposition was enunciated by this court in the case of Fallbrook Irrigation District v. Bradley, 164 U. S. and I take it to be the settled law with regard to the construction which this court will place upon the decisions of the court of last resort of any state or territory. It may be urged that there is a difference between a state and a territory in view of the fact that the state is a local sovereignty while the territory is not, but I take it that while a territorial form of government is not sovereign in the sense that a state is, yet an Organic Act having been granted to Oklahoma Territory by Congress, and the Legislature having been authorized to legislate upon all rightful subjects of legislation not in conflict with the Organic Act and the Constitution of the United States or matters reserved by Congress, that to the

extent indicated the acts of the Territorial Legislature and the decisions of its courts of last resort are entitled to the same construction as the acts and decisions of a state Legislature or court.

The third assignment of error is as follows: "The court erred in the 19th section of the instructions to the jury in charging the jury as follows: "The jury are instructed that if from all the evidence, facts and circumstances in evidence in the case, you believe beyond a reasonable doubt that the defendant New could have withdrawn from the scene of the tragedy with safety and could have gone away from the scene of action with safety to his life and person and without committing the homicide described in the evidence, as a matter of law it was his duty to have done so and if he did not and you further believe from the evidence beyond a reasonable doubt that the homicide was not necessary in a reasonable and necessary defense of the life or person or habitation of said New at the time of the said homicide, then your verdict should be guilty of murder."

The plaintiff in error claims that this instruction is erroneous in that it placed upon the defendant the duty, when frightened and approached in a threatening manner upon his own premises, to retreat at the approach of his adversary, and that it deprived the defendant of the right of acting upon the reasonable appearances of danger, viewed from his standpoint, and weighed his actions by the actual danger he was then laboring under "from all the evidence, facts and circumstances in evidence" before the jury.

In the first place; counsel, for plaintiff in error proceed upon a mistaken assumption as to the meaning of this instruction and next they violate that elementary rule of construction which is that the jury was not at liberty to single out an isolated instruction and act upon it, but that all of the instructions of the court are to be taken and construed together, and so viewed in arriving at a determination.

This instruction, standing singly and alone, is not subject to the objection urged against it by the plaintiff in error, but taken in connection with the other instructions given by the court, they are so eminently fair as to warrant no complaint of any kind or character on the part of the plaintiff in error.

For the purpose of pointing out to this court specifically the other instructions which should be considered in connection with this, I call your attention to Instruction No. 1, asked by the Territory, on page 99 of the printed record which reads as follows:

"The detendant seeks to justify or excuse the killing on the ground of threats made by Doyle, to take his life and on the ground of self defense. Now, threats by Doyle to kill New do not afford a justification for New killing Doyle, unless it be shown by the evidence that at the time of the killing Doyle by some act then done, manifested an intention to kill New or do him some great bodily harm. If the defendant at the time of the killing had a reasonable apprehension that it was the intention of Doyle to make an immediate assault on

him and take his life or do him some great bodily harm, he had the right to defend himself and it would make no difference whether the danger was real or imaginary, so that it had the appearance of being real, and in determining the question of apparent danger, you should look at the facts from the defendant's standpoint. But in order for New to justify himself on this ground, you must believe from the evidence that the circumstances surrounding the parties was such as to create, and did create in the mind of New a bona fide apprehension on the part of New that it was the intention of Doyle to make an immediate assault on him, the defendant, and take his life or do him some great bodily harm and if you believe that the said Doyle, by some act done, or words spoken at the time of the killing, created in the mind of New a just and reasonable apprehension of death or serious bodily injury, and that the said New shot and killed the said Doyle to defend himself from such danger, if any there existed, then you will find the defendant not guilty. The defendant New had no right to kill Doyle under the apprehension that Doyle might kill him at some future time, and if you find that was the motive that induced New to kill Doyle then he could not justify the killing on the ground of self defense."

Also to instruction No. 3, asked by the Territory; on page 100, which reads as follows:

"Every person is permitted by law to defend himself against any unlawful attack, reasonably threatening injury to his person and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary."

Nothing could be more fair than the above

instructions, and they completely do away with any objections which could be urged against the 19th instruction complained of by the plaintiff in error, but if the instructions asked by the Territory were not sufficiently favorable to the defendant, they were certainly covered by the special instructions given by the court at the request of defendant and to which I call the attention of this court as follows:

The first instruction given by the court at the request of the defendant, on page 101 printed record, reads as follows:

"The jury are instructed as a matter of law that if a person believes, and has a reasonable cause to believe that another has sought him out for the purpose of killing him, or of doing him great bodily harm, and that he is prepared therefor, with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but he has the right to stand and defend himself, and pursue his adversary, (if necessary) until he has secured himself from danger, and if in so doing, it is necessary, or it appears on reasonable grounds to be necessary to kill his antagonist, the killing is excusable on the ground of self defense."

The interlineation "if necessary" was added by the court, to which the defendant excepted.

Instruction No. 2, requested by defendant, page 101, record, reads as follows: "In this case the defendant pleads that in taking the life of the deceased, Doyle, he acted upon reasonable appear-

ances of danger, of being killed by the deceased, or of receiving serious bodily harm at the hands of the deceased. In passing upon this defense it is your duty to view the facts and circumstances occurring at the time of the killing from the defendant's standpoint, as they then reasonably appeared to him."

Defendant's request, Instruction No. 4, page 102, record, reads as follows: "To excuse himself in this case, upon the ground of self defense, it is not necessary that the defendant should have been in actual danger of losing his life, or of having serious bodily injury inflicted upon him by the deceased. It is sufficient in law to justify the defendant in taking the life of the deceased if at the time of the homicide it then reasonably appeared to the defendant from the acts of the deceased, considered in connection with the previous threats of the deceased, if any such threats appear from the evidence to have been made, that it was then the intention of the deceased to kill the defendant, or to inflict serious bodily injury upon him, and, if you so find from the evidence or, if from the evidence you entertain a reasonable doubt as to whether the defendant actually believed he was in danger and such belief was based upon reasonable evidence of danger, and made the fatal assault while acting under such belief, you will acquit the defendant, although as a matter of fact the defendant was in no actual danger at the hands of the deceased at the time of the killing, (provided you further believe from the evidence that the defend-

ant believed such killing was necessary for such defense.")

This instruction was modified, by the interlineation shown in the brackets, to which the defendant excepted.

It seems to me that a mere reading of these instructions takes away all grounds of argument of the plaintiff in error, based upon Instruction No. 19. In their assignment of error they say as above quoted that it deprived the defendant of his right to act upon the reasonable appearance of danger viewed from his standpoint at the time, and yet, as was just shown by the court, the jury were specifically instructed at the request of the defendant, that the defendant had the right to act upon the appearance of danger as it looked to him at the time, and that the jury should look at the facts from the defendant's standpoint. They were also instructed in Instruction No. 1, given at the request of the defendant, that a person when unlawfully assaulted is not required to retreat, but has a right to stand and defend himself, etc., so that taking all of the instructions together they could not possibly have been mislead or have misunderstood Instruction No. 19. The court in examining Instruction No. 19 will observe that the first half of the Instruction is qualified by the latter half, but even taking Instruction No. 19 alone, still it does not conflict with the rules of law applicable to this case.

The plaintiff in error seems to rely mainly upon the authority of the case of Beard v. United

States, 158, U. S. pages 550 to 564 and the doctrine announced by this court therein. I take no issue with the law announced by this court in that case and the mistake which counsel for plaintiff in error make is in saying that the facts in that case are analogous with this.

The syllabus in the Beard case reads as follows: "A man assailed on his own grounds without provocation, by a person armed with a deadly weapon. and apparently seeking his life, is not obliged to retreat but may stand his ground and defend himself with such means as are within his control; and so long as there is no intent on part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his own life, is not guilty of murder or manslaughter if death results to his antagonist from the blow given him under such circumstances."

In the Beard case there was an angry dispute between Beard and three brothers by the name of Jones over the right of one of the Jones boys to forcibly remove a cow from the premises of Beard on which the dispute occurred, they asserting the right to take the cow and he asserting his lawful right to retain it and in the progress of the dispute one of the Jones brothers advanced upon Beard in a threatening manner with his hand in the pocket of his trousers and when he got within five or six steps of Beard the latter warned him to stop but he did not do so. As he approached nearer to Beard he was asked by Beard what he intended to

do, to which he replied: "Damn you, I will show you," at the same time making a movement with his left hand as if to draw a pistol from his pocket, whereupon the accused struck him over the head with his gun and knocked him down.

In the case at bar no assault was made by Doyle upon New and at the most New only claimed that from certain motions that Doyle was making he believed that Doyle was about to draw a pistol and that without waiting a moment for further developments he drew his Winchester rifle and shot at Doyle.

The doctrine announded in the Beard case undoubtedly applies to a person who is assailed upon his own premises. I concede that when a person is in a place where he has a right to be and is without fault and has committed no overt act or done nothing to provoke an assault, that when he is assailed in a violent manner that he may stand his ground and repel force by force and if necessary for the actual or apparent preservation of his life, or to defend himself from great bodily injury, he thereby slays his assailant, he will be justified, but the facts in this case do not bring it within the operation of the rule just announced and the instructions given by the court were more favorable than the plaintiff in error was entitled to.

The doctrine announced in the Beard case has been adopted by the Supreme Court of the Territory of Oklahoma, as announced in their opinion in the case of Mahaffey v. the Territory, 11th Oklahoma, 231, 232.

I feel confident that when this court shall examine the instructions given by the trial court, in connection with Instruction No. 19, that from a review and comparison of all the instructions so given you will have no hesitancy in declaring that all the rights of the defendant were fully protected thereby.

The fourth assignment of error is to the effect that the trial court erred in instructing the jury, (No. 15½,) as follows: "The court instructs the jury that if a man kills another through mere cowardice; or under other circumstances, which are not, in the opinion of the jury, sufficient to induce a reasonable and well grounded belief of danger to life or great bodily harm in the mind of an ordinarily courageous man, the law will not justify the killing on the ground of self defense."

I do not believe that this assignment is entitled to serious consideration by this court. As stated by the Supreme Court of Oklahoma, in its opinion, it might be a question whether the instruction was necessary at all, under the evidence of the case, and was evidently given because of the statements of the defendant that he was afraid the deceased would kill him, and this instruction was given for the purpose of covering this branch of the case, so that the jury would not be misled in case they believed that the killing was done by reason of the cowardice of the defendant, or in other words, through fear that amounted to cowardice.

I believe, however, that it was proper to give

this instruction, in view of the declaration of the defendant that at the time he rested his rifle upon a post and shot Doyle in the thigh, at the time when Doyle had stopped about one hundred yards off, when he was running away from New, that New said he shot him because he was afraid that he, Doyle, might turn and shoot him, and again, because of his statement that when he shot Doyle in the house after he had pursued him to the inner room and found him sitting on the floor hiding behind the door, that he shot him because he was afraid that Doyle might shoot him.

If the statement of New was in fact true, it would be no defense and no excuse for his acts and would be such an exhibition of cowardice on his part as would not amount to a defense in law.

I take it that it needs no citation of authorities to this court to sustain the proposition, but that it has become elementary that if one person kills another through mere cowardice, he cannot justify himself for so doing, and the court was very careful in this instruction to tell the jury that if a man kills another through mere cowardice, or under circumstances, etc. not sufficient to induce a reasonable and well grounded belief of danger to life or of great bodily harm in the mind of an ordinarily courageous man; certainly this was the law and when the defendant was placed under the operation of those rules which would apply to the question of ordinary courage under similar circumstances, he was given all that he was entitled to under the law.

As the fifth assignment of error, it is alleged that the trial court erred in assuming as a fact that the deceased came to his death from the defendant. with a Winchester rifle, shooting a bullet into the body of the deceased, and in assuming as a fact that the said shooting and bullet was the cause of the death of the deceased, etc.

It is only necessary to call the attention of the court to the fact that the defendant admitted the killing and sought to justify himself on the ground of self defence, and that it was an undisputed and admitted fact throughout the trial of this case that Doyle was killed by New, that New testified to this fact himself when on the witness stand, and in this respect the same argument might be advanced as that made herein, opposing the claim of the plaintiff in error that there was a variance between the allegations and the proof.

The specific objection urged in this assignment seems to be to the expression used by the court in one of the instructions, wherein the court used the language. "at the same time the fatal shot was fired by the defendant," and the expression, "before the fatal shot was fired." It is claimed that this was an assumption by the court, an invasion of the province of the jury.

I cannot believe that where the killing was admitted and the fact undisputed that the fatal shot had been received by the deceased at the hands of the defendant, that the mere use of such an expression as this above quoted, is erroneous, and certainly if it was, it was harmless error under

the facts in this case and could not have been prejudicial in any manner to the defendant.

The sixth assignment is that the court committed error in refusing to give Instruction No. 1, requested by the defendant, but modified the same by inserting therein the words "if necessary." (See page 101, printed record) The propriety of inserting the expression "if necessary" in this instruction is so apparent that I do not feel that it needs any argument on my part to sustain the action of the trial Judge in so doing.

Returning briefly to the proposition that the instructions should be considered as a whole and not by singling out some particular instruction and attempting to construe it by itself, I call the attention of the court to the doctrine announced by the Supreme Court of Kansas in the case of the State v. Yarborough, 39 Kans. 588. In the opinion written by Chief Justice Horton, he says: "Instructions are to be considered and construed together as a whole and if not erroneous when so construed, no one of them will be held erroneous." (State v. Dickson, 6 Kans. 209; State v. Potter, 15 Kans. 302; State v. Rhea, 25th Kans. 576).

In their brief in the Supreme Court of Oklahoma, counsel for plaintiff in error lay much stress on the frailties of human nature and upon the doctrine that where one person kills another while acting under the influence of great excitement and terror induced by a sudden attack made upon such person by another who seeks to take his life or by a sudden passion caused by such assault, that a

killing by a defendant under such circumstances cannot be murder.

While it is true that the law, in its tender regard for the imperfections of human nature and for the protection of the person of one who may be unlawfully threatened with great danger to his life, has often permitted such facts and circumstances to be considered for the purpose of taking from the offence charged that element of malice aforethought and wickedness of heart which is supposed to accompany the perpetration of a murder, yet this doctrine is not applicable to the facts in this case.

The law carefully distinguishes between a sudden transport of passion which springs instantaneously, from what it allows as a sufficient provocation and which prompts to an immdiate act of violence, and a purpose of revenge, which usually follows such passion.

In the first case, in condescension to the frailty of our nature; the law allows the provocation to extenuate a homicide committed at the instant, from murder to manslaughter.

In the other, the provocation furnishing an incentive to revenge, so far from extenuating the crime, is a circumstance to be looked to as evidence of malice.

It must be borne in mind that the criminal law holds sane men responsible for the ordinary exercise of their reason; that although indulging to a certain extent mere infirmities of human nature, nevertheless it requires the exercise of control or

mastery over one's passion. The law does not allow a man to voluntarily strip himself of all those balancing instincts by which even the worst of us continues to walk with some degree of steadiness among temptations. (State vs. Yarborough, supra.)

Every sane man is supposed to contemplate and intend the usual and ordinary results of the acts done by him.

In this case there is no claim made that the defendant, New, was not a man of sound mind or of ordinary discretion. The evidence in the case shows that he was not on good terms with the deceased and that he had many reasons to harbor motives of revenge against the deceased. Even were his own testimony true he had no sufficient provocation for firing the first shot at the deceased. Even if he had that provocation, the justification passed long before the commission of the acts by which he inflicted the fatal wound upon the deceased. Taking his own evidence in connection with the other facts and circumstances of the case and instead of making out a case of justifiable homicide, it shows beyond peradventure that his mind was full of thoughts of revenge or fancied grievances against the deceased and that instead of honestly believing his life to be in danger at the time he fired the first shot, that he sought out and took advantage of the first opportunity or slightest pretext that presented itself that gave him an opportunity to take the life of the deceased.

Had he been actuated by honest fright when

he fired the first shot, he being a man of sound mind and ordinary intelligence, must have known that when Doyle began to flee from him and had reached a point one hundred yards away, that he (New) was out of danger, and why was it if he were actuated by fright, that even though, if justifiable in his acts he had a right to stand his grounds, that he did not endeavor to get away from Doyle, for with Doyle running in one direction, had he gone the other, certainly there was no danger. But he does not stop even here and after he has deliberately placed his gun upon a post and drawn steady aim at Doyle and shot him through the thigh, and after Doyle has sunk down upon the ground and raised up again and started to run toward the house of Trotter, removing himself as fast as possible from the proximity of New, why does New still pursue him and keep pursuing him, even to the inner room of the house of Mr. and Mrs. Trotter where, when he finds him hiding behind the door, trying to escape the vengeance of his blood thirsty pursurer, he then shoots him down without mercy and further mutilates his body by crushing in his skull.

Where in the history of this case can there be found any facts or circumstances which entitles the plaintiff in error, New, to plead the frailties of human nature and ask in his behalf the tender mercies of the law. The evidence all shows that New committed a brutal, cowardly and atrocious murder. That he formed a design to take the life of Doyle. Whether that design was one of long

standing or whether it was formed immediately before the commission of the homicide, is immaterial so far as this case is concerned, for under the law of our Territory, a design sufficient to constitute murder, may be formed instantly before the commission of the homicide.

The plaintiff in error had a fair and impartial trial by a jury of his fellow countrymen and to whose qualifications he makes no objections.

All the facts were carefully detailed, the rights of the defendant were conserved in every instance by the fair and impartial rulings of the court and by full instructions to the jury upon the law of the case

There is nothing in this case of which the plaintiff in error can complain or which entitles him to any other consideration from this or any other court than that sympathy which we naturally feel for every unfortunate human being who has allowed his evil nature to gain possession of him and overcome and over-ride whatever good instincts he may originally have had.

Those who commit heinous crimes must not expect to go unpunished and the plaintiff in error, New, in being condemned to pass the rest of his life in penal servitude, instead of complaining, has reason to be thankful that the jury before whom he was tried did not see fit to impose the death penalty upon him, as they would have been amply justified in doing under the evidence in this case.

All things considered, I contend that the re-

cord is without error, of which this court will be called upon to notice, and I therefore ask that the judgment of the Supreme Court of the Territory of Oklahoma be affirmed in all things.

Respectfully submitted;

P. C. SIMONS,

Attorney General of Oklahoma Territory, for Defendant in error.

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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 226.

JOHN T. NEW, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

P. C. SIMONS,
Attorney General of Oklahoma,
for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1904

SUPREME COURT OF THE UNITED STATES.

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No. 226.

JOHN T. NEW, PLAINTIFF IN ERROR,

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THE TERRITORY OF OKLAHOMA, DEFENDANT IN ERROR.

Supplemental Brief for Defendant in Error.

The defendant in error contends that this court has no appellate jurisdiction to review on writ of error the final decision of the supreme court of Oklahoma in a criminal action.

An appeal being a statutory right, unless there is some express act giving this right, it does not exist.

In the organic act providing a temporary government for the Territory of Oklahoma are found the provisions creating the courts of the Territory, defining their jurisdiction, etc., and from which I extract the following:

Organic act, Oklahoma Territory, vol. 26, United States Statutes at Large, 51st Congress, 1889–1891.

Chap. 182. An act to provide a temporary government for the Territory of Oklahoma, etc.

Pages 81 to 100.

"SEC. 4. That the legislative power and authority of said Territory shall be vested in the governor and Legislative Assembly. The Legislative Assembly shall consist of a council and a house of representatives etc.

"SEC. 9. That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts and justices of the peace, etc.

"* * * and the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property, etc. * * * Writs of error, bills of exception and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court under such regulations as may be prescribed by law, but in no case removed to the supreme court shall trial by jury be allowed in said court. Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, *where the value of the property or the amount in controversy*, to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars.

"SEC. 11. That the following chapters and provisions of the Compiled Laws of the State of Nebraska, in force November 1st, 1889, in so far as they are locally applicable and not in conflict with the laws of the United States or with this act are hereby extended to and put in force in the Territory of Oklahoma until after the adjournment of the first session of the Legislative Assembly of said Territory, namely * * * and of part three thereof entitled 'Criminal code.'"

Passing to the act creating the circuit court of appeals, we find the following provisions:

Vol. 26, U. S. Statutes at Large, chap. 517, pages 827 and 830, provides:

"SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases: * * * 'In cases of conviction of a capital or otherwise infamous crime.'

"SEC. 6. That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases etc. * * * also in all cases arising under the patent laws, under the revenue laws, *and under the criminal laws*, etc."

Then follows provision for certifying any question up to the Supreme Court of the United States:

"SEC. 15, page 830. That the circuit court of appeal in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgment, orders and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits."

Approved March 3, 1891.

Afterwards section 5 of the act creating the circuit court of appeals was amended as follows:

Vol. 29, U. S. Statutes at Large, chap. 68, page 492.

"That so much of section five of the act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the

United States and for other purposes,' approved March 3, 1891, as reads 'in cases of conviction of a capital or otherwise infamous crime,' be amended by striking out the words 'or otherwise infamous,' so that the same will read 'in cases of conviction of a capital crime;' and that appeals or writs of error may be taken from the district court or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital;" etc.

The general provision providing for appeals in capital cases from convictions in any court of the United States is as follows:

Vol. 25, U. S. Statutes at Large, chap. 113, pages 655 and 656
Jan. 25, 1889.

"SEC. 6. That hereafter in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs, etc."

The general provision last quoted does not apply to an appeal from the supreme court of the Territory of Oklahoma, nor the district courts of Oklahoma, for the reason that they are not "courts of the United States" as contemplated by said act. The courts meant by said act are the constitutional courts of the United States as distinguished from a legislative court.

The supreme and district courts of Oklahoma are legislative courts created by Congress under the power which it possesses to make all needful rules and regulations respecting the public territory, etc.

As decisive of this question I cite the case of—

McAllister *vs.* United States, pages 174 to 191.

I call your especial attention to that part of the opinion contained on pages 175 to 184, which contain a very full discussion of the identical question involved here, and cites many authorities.

Without attempting to quote at any length from the opinion I will extract the conclusion reached after a résumé of the matter by the court, as follows:

"These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that courts in the Territories created under the plenary municipal authority that Congress possesses over the Territories of the United States, are not courts of the United States created under the authority conferred by that article."

Summarizing the foregoing provisions, we come to the following conclusions:

1st. Appeals or writs of error may be taken from the district and circuit courts of the United States direct to the Supreme Court of the United States in capital cases.

2d. Appeals or writs of error in cases less than capital offenses shall be taken from the district and circuit courts to the circuit court of appeals and their decision shall be final.

3d. The circuit court of appeals has power to review the judgments of the supreme courts of the Territories in the same manner as of the district and circuit courts *in cases in which the judgment of the circuit court of appeals is made final. This includes criminal offenses less than capital.*

4th. The Supreme Court of the United States has power to review the judgments of the supreme court of the Territory of Oklahoma in civil cases where the amount in controversy exceeds the sum of $5,000, by virtue of the express provisions contained in the organic act.

5th. The provisions of the act of 1889 relating to appeals from courts of the United States in capital cases to the Supreme Court of the United States do not apply, because the courts of Oklahoma are not "courts of the United States" as contemplated.

6th. No statutory provision having been made whereby a capital case can be appealed from the supreme court of Oklahoma Territory to this court, and murder being an offense punishable by death or imprisonment for life at the discretion of the jury, under the laws of Oklahoma, and the plaintiff in error having been convicted of murder, this court is without jurisdiction to review the judgment of the supreme court of Oklahoma affirming the conviction.

All of which is respectfully submitted.

P. C. SIMONS,
Attorney General of Oklahoma Territory, for Defendant in Error.

Supreme Court of the United States.

No. 226.—October Term, 1904.

John T. New, Plaintiff in Error, vs. The Territory of Oklahoma. } In error to the Supreme Court of the Territory of Oklahoma.

[November 28, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

John T. New was tried on an indictment for murder in the District Court of Washita County, Oklahoma Territory, found guilty, and his punishment fixed by the jury at imprisonment for life.

The Crimes Act of Oklahoma provided that every person convicted of murder should "suffer death or imprisonment at hard labor in the Territorial penitentiary for life, at the discretion of the jury." Stat. Okl. 1893, p. 456, c. 25, § 13; Stat. Okl. 1890, c. 25, art. 17, § 13.

Judgment was entered on the verdict and New was sentenced accordingly. He carried the case to the Supreme Court of the Territory and the judgment was affirmed. This writ of error was then allowed, and the objection is made that this court has no jurisdiction to review the judgments of the Supreme Court of Oklahoma in criminal cases for want of statutory provision to that effect.

By the "Act to provide a temporary government for the Territory of Oklahoma," approved May 2, 1890, 26 Stat. 81, c. 182, "the legislative power and authority of said Territory" was vested in the governor and legislative assembly, and the power extended "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Section 28 provided: "That the Constitution and all the laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States; and all acts and parts of acts in conflict with the provisions of this act are as to their effect in said Territory of Oklahoma hereby repealed;" and by a proviso section 1850 of the Revised Statutes, requiring the submission of Territorial laws to Congress, was made inapplicable to Oklahoma.

By section 11 certain enumerated "chapters and provisions of the Compiled Laws of the State of Nebraska, in force November first, eighteen hundred and eighty-nine, in so far as they are locally applicable, and not in conflict with the laws of the United States or with this act, are

hereby extended to and put in force in the Territory of Oklahoma until after the adjournment of the first session of the legislative assembly of said Territory, namely: . . . and of part three thereof, entitled 'Criminal Code.'"

This temporary provision was supplanted some months subsequently by laws passed by the Oklahoma legislative assembly. Statutes, Oklahoma, 1890. These statutes were elaborate and comprehensive, and embraced a Crimes Act, with due provision for procedure.

Section 9 of the organic act reads as follows:

"SEC. 9. That the judicial power of said Territory shall be vested in a Supreme Court, District Courts, probate courts, and justices of the peace. . . .

" . . . and the said Supreme and District Courts, respectively, shall possess chancery as well as common-law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property. . . . Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said District Courts to the Supreme Court under such regulations as may be prescribed by law, but in no case removed to the Supreme Court shall trial by jury be allowed in said court. Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness shall exceed five thousand dollars; . . ."

So far as review by this court is concerned, this is the usual provision, and is limited to civil cases. We are then brought to inquire whether any other statute may be invoked to sustain our jurisdiction.

Section 5 of the Judiciary Act of March 3, 1891, (26 Stat. 827, c. 517,) provided that appeals or writs of error might be taken from the District and Circuit Courts directly to this court in certain enumerated classes of cases, among which were "cases of conviction of a capital or otherwise infamous crime." By amendment the words "or otherwise infamous" were stricken out, and it was declared that cases of convictions for an infamous crime not capital might be carried to the Circuit Courts of Appeals. 29 Stat. 492, c. 68.

By section 6, the judgments of the Circuit Courts of Appeals are made final in cases arising under the criminal laws.

And section 15 provides: "That the Circuit Court of Appeal in cases in which the judgments of the Circuit Courts of Appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the District Court and Circuit Court;

and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

But the case before us is a capital case and not included in the criminal cases to which the jurisdiction of the Circuit Courts of Appeals extends. It is suggested that, as it follows that if this court has no jurisdiction, convictions for crimes not capital are reviewable on a second appeal, while convictions for a capital crime are not, this involves an absurdity, hardship or injustice, presumably not intended. We held, however, in *Folsom* v. *United States*, 160 U. S. 121, that the intention was plain and that the statute must be taken as it read.

There remains the act of January 25, 1889, 25 Stat. 655, c. 113, by the sixth section of which it was provided that "in all cases of conviction of crime, the punishment of which prescribed by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error." As to this, however, it was ruled in *Cross* v. *United States*, 145 U. S. 571, that, in view of the terms of the whole section, the allowance of a writ of error to any appellate tribunal was not contemplated, but merely to review the judgment of the trial court.

It is thus seen that there is no statute giving appellate jurisdiction to this court over the judgments of the Supreme Court of Oklahoma in capital cases.

Reference is made to *Queenan* v. *Oklahoma*, 190 U. S. 548, in which we entertained jurisdiction in the absence of any suggestion as to the want of it. *United States* v. *Simms*, 1 Cranch, 252, is an instance of similar inadvertence, and when cited in *United States* v. *More*, 3 Cranch, 159, 172, Chief Justice Marshall disposed of it in these words: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself bound by that case."

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.